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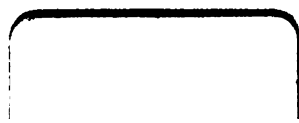
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**THE INTERNATIONAL LAW AND CUSTOM
OF ANCIENT GREECE AND ROME**



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TORONTO

THE INTERNATIONAL LAW AND CUSTOM OF. ANCIENT GREECE AND ROME

BY

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IN TWO VOLUMES

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**DEDICATED
TO
THE MEMORY OF MY MOTHER**

PREFACE

THE present work, it is believed, offers to the reader the first comprehensive and systematic account of the subject (namely, the international law, public and private, of ancient Greece and Rome) that has appeared in any language. I am by no means unmindful of such writings as the two volumes of Laurent devoted to Greece and Rome. But his exposition, so readable, clear, and interesting as it is in many ways, suffers through irrelevance and discursiveness, through expatiation on generalities, entire neglect of the most vital questions, superficial examination of many quoted authorities, and a most lamentable disregard of much documentary evidence which was accessible at the time he wrote. More fundamental drawbacks are his unreasoning preconceptions and his inadequate grasp of the legal point of view. I have reluctantly taken the liberty thus to refer to this author, not at all in a captious or obtrusively disparaging spirit, but chiefly because of his pernicious influence on subsequent writers who, still more blameworthy than himself, followed him unwarily, accepted his conclusions (charmingly as they are couched) without question, and failed to realize his numerous errors and pronounced bias.

All these faults, whether of substance or of method, I have tried to avoid. It has, moreover, been my constant aim, in conformity with my prearranged general plan, to bring out the juridical side of the subject, rather than to trace elaborately its historical development; for it is the former aspect which has hitherto been well-nigh neglected, or imperfectly

examined, and which has, therefore, given rise to misconceptions and oft-repeated blunders on the part of modern writers. Almost invariably have modern writers on international law when referring—or, rather, condescending to refer—to Greece and Rome, dismissed their international institutions as never having existed at all, or as having been merely sporadic negligible phenomena, or, at most, as presumably answering to a few vague generalizations, copied and recopied from preceding writers who, in turn, had paid but little heed to the original sources of evidence. Although it is avowedly my desire to show the existence of a considerable body of ancient international law (and to term it, in the case of Greece, ‘intermunicipal’ law, is not the least detraction, as I have shown in an early chapter), I have taken care not to belittle anything that militated against a doubtful thesis, or to exaggerate what supported it.

In recent times a larger mass of material, in the form of epigraphic and other historical documents, has become available; and, what is of cardinal importance, a more scientific method is, in consequence, demanded of investigators. I have been at pains to go through a wide field, comprising most of the ancient authors, large collections of Greek and Latin inscriptions, and the contributions of modern writers. In reference to the ancient sources, it will be seen that I have here set forth, if not extensive regions, at least, numerous byways, which had hitherto remained unexplored, in so far as the subject-matter of this book is concerned. I have refrained from discussing questions of dubious authorship, arising in certain cases, or those of controverted readings, in others. The solution of nice literary or bibliographical problems scarcely falls within my chosen sphere. I have simply investigated the statements usually attributed to this or that author, with a view to extracting their intrinsic testimony, when it was relevant to my purpose. Here and there I have referred to legends and traditions,

as recounted by classical authors. In doing so I did not assume that such evidence possesses the same degree of cogency and validity as that of actually recorded facts, with respect to any particular institution at any given time; I introduced such legendary reports merely to reinforce the conclusions derived from more historical and more reliable data, and—what is of especial significance—to indicate the existence of an inveterate juridical consciousness, whose manifestations are perceived in subsequent regularized systems and actual interstate practice. For similar reasons—and not by way of urging incontrovertible proof of specific details—have I cited passages from historians and annalists, whose narratives were not infrequently inspired by an overweening desire to panegyryze their own respective States to the disadvantage of others.

I have invariably given the original texts, epigraphic or other, as the indispensable documentary sources (the *Quellen*, as German writers say), which exhibit the grounds whereupon my conclusions are based. I have in many cases in the course of the book carefully examined the opinions of modern writers on various relative matters, advanced reasons for any disagreement with them, and ventured to submit reconstructions of divers views respecting certain important questions. On the other hand, where I have not been able to discover adequate and relevant testimony, I have not allowed unjustifiable conjecture or random excursions of the imagination to serve instead,—for, in this respect, the sanction of scientific method has operated throughout as the governing factor.

In the development of my argument, and in the formulation of the propositions issuing therefrom, I have always endeavoured to be concise and to the point. A large proportion of the text could easily have been expanded by additional materials in my possession; but, to avoid the overburdening of the essential principles and conclusions with too much detail, I have refrained—in certain cases somewhat

regretfully—from diverging into many tempting ‘deverticula amoena.’

I may point out that such readers as are unacquainted with the ancient or modern languages will be able to follow the main substance of the work, inasmuch as the citations are either translated, or their purport briefly embodied in the text, according as circumstances required. In the case of the longer passages from Thucydides and Polybius, I have gratefully availed myself of the fine translations of Jowett and Dr. Shuckburgh respectively.

I had intended to give here a *résumé* of the subjects of public and private international law that I have considered, to indicate my reasons for their present arrangement, to show the connection of the chapters and their logical sequence, and to draw attention to the methods of exposition I have generally adopted; but, I think, all this will clearly enough appear partly in the analytical contents, and partly in various places in the course of the earlier chapters. I may say, however, that Greece and Rome have been consistently treated side by side, and, for the most part, comparatively; so that their respective acceptance of and insistence on juridical principles, and their application of a regularized procedure and legal methods to international relationships will thus be the more forcibly emphasized.

As to the bibliography, I have arranged in five classes the works which have been consulted to a greater or lesser extent. Nothing need be said about the first and second divisions, as their purport is obvious. With regard to the others, however, it is not to be understood that my intention was to place them in order of merit. The main consideration—the *principium divisionis*—was the amount of the subject covered by the writings in those classes; so that whilst class III. contains works dealing with several of the topics I have considered, class IV. includes such as treat almost exclusively of certain limited portions of the

subject-matter ; and, finally, the fifth section comprises miscellaneous writers, whose testimony has been invoked in the case of some or other particular point. I have abstained from characterizing this or that work by epithets of praise or condemnation ;—my foregoing reference to Laurent was actuated solely by the desire to combat the fallacious modern tradition which is largely due to his treatment, though his work is, indeed, more valuable, in many respects, than a good many others I have included. The discerning reader will, no doubt, readily discover which of the tabulated writings will be the most useful for the further investigation of any of the subjects constituting or relating to the substance of this book ; and to facilitate such inquiry I have, where it was thought desirable, added notes to the titles of many works in order to indicate the nature of such of their contents as have a direct bearing on my scope. No claim is, of course, made to perfect completeness of the bibliography, though the reader will, no doubt, allow that it is the fullest that has ever been presented. The majority of the books I have consulted at the British Museum ; but I may, in this connection, take the opportunity to say that the establishment in London of a thoroughly equipped library of comparative law, systematized on a practical and rational basis, would prove a veritable treasure-house to legislators and publicists, to professional writers and researchers, and would also stimulate fresh investigators to enter a field of work to which Englishmen (who are by no means fundamentally inferior to the best foreign students in the task of original research) have so far contributed too little.

It may be worth while to point out that I have not had any assistance whatever in the composition of the work, or even in seeing it through the press ; I have myself transcribed the ancient texts and the passages from modern continental authors, revised the proofs, prepared the index, etc., and in all this trying labour (considerably lightened, however, through the care and intelligence of

the printers and their readers), I have done my best to avoid inaccuracies. But having regard to the comprehensiveness of the matter and the multiplicity of details, the experienced and learned reader will, I am confident, overlook any small errors, typographical or other, which his keen eye may detect.

May I, in conclusion, express the hope that the work will be found of some use not only to students of ancient law and of comparative law in general, but also to students of the classics and ancient history, as well as to those interested in comparative politics and in the evolution of public and private international law in particular. If the book finds favour with such readers, I may possibly continue, on somewhat similar lines, with the preparation of further volumes on the development of international law in the middle ages and in modern times.

I cannot conclude my prefatory observations without expressing my sincere thanks to my esteemed friend Sir John Macdonell, C.B., M.A., LL.D. (Master of the Supreme Court and Quain Professor of Comparative Law in the University of London), for his kindness in writing the introductory note.

COLEMAN PHILLIPSON.

INNER TEMPLE,
October 31st, 1910.

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INTRODUCTORY NOTE

My friend, Dr. Phillipson, has asked me to add an introductory note to these volumes. They need no recommendation. But I gladly make use of the opportunity to say, with some knowledge of English and foreign literature on the subject, that they give that which is to be found nowhere else. There is a multitude of essays, papers and monographs (rarely written by lawyers) relating to parts or isolated points. Many of them are of great value. None deal fully and systematically with the whole subject. Dr. Phillipson rightly claims that "the present work offers to the reader the first comprehensive and systematic account of the subject that has appeared in any language." I have sought for such a work, and have hitherto not found it.

These volumes, with their copious and convincing details, will help to dispel the fiction, still sometimes repeated, that in the sixteenth and seventeenth centuries a group of writers, notably Albericus Gentilis and Grotius, "founded" international law. When stable communities—whether tribes, or City-States, or States of a modern type—are permanently contiguous, customs hardening in time into law never fail to regulate their intercourse. *Ubi societas, ibi ius*; wherever developed communities are brought in contact with each other, juridical relations must sooner or later be formed not mainly by agreement, tacit or express, but by the very necessity of the case, and partly from the same causes as those which working internally create States.

These volumes reveal not only the existence of a system of international law in the ancient world, but one in some respects much more akin to that of to-day than international law as it was in the time of Grotius. In the number and variety of autonomous States ; in the many different forms of their constitutions ; in the existence of autonomous democratic States ; in the conception of the State itself, wholly different from the feudal or patrimonial conception ; in the number and variety of dependent communities ; in the existence of federations ; in the unstable balance of power ; in the relations of the mother countries to autonomous colonies ; in the multitude of treaties dealing with many subjects besides peace and war ; in the developed use of arbitration, as a mode of settling differences ; in the practice as to passports,—in these and many other matters there is more likeness between the international law in ancient Greece and that of to-day than there is between the latter and international law as described in *De Jure Belli ac Pacis*.

With one remark by Dr. Phillipson I would desire to emphasize my agreement. "The establishment of a thoroughly equipped library of comparative law, systematized on a practical and rational basis, would prove a veritable treasure-house." Every student of comparative law will agree with this. Perhaps the establishment one day of an Institute of Comparative Law, so much needed, may help to create such a "treasure-house."

JOHN MACDONELL.

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CHAPTER I

THE GREEK CITY-STATE SYSTEM

It has not infrequently been said that international law, public as well as private, that is, international law usually recognized, admitted, or insisted on as such in the strict sense of the term, is a creation of the modern States, and of the modern States alone; and that the ancient peoples, including the Hellenic and the Italic races, had no clear conception of a true law of nations. Denial of the existence of ancient law of nations.

But such an attitude implies erroneous preconceptions, and indicates a blindness to historic perspective. In the comparison or contrast of races at different epochs in the world's history, or at different stages of development, generalities prove only too seductive to the unthinking and careless mind. That which exists now has its roots somewhere in the distant past; sometimes, indeed, the past presents to the investigator more than mere roots of rudimentary development; in truth, it occasionally offers a rich efflorescence of complex organisms, whose significance may perhaps not be at once obvious owing to the different nature of the later stages of evolution, and the different point of view fostered by constant contact therewith. The errors involved.

Nowadays, law, whether international or municipal, is universally regarded as possessing a positive character, and as established by the general agreement of States or citizens, as the case may be. In the past the rules of the law of nations as then existing were closely allied with religious and moral codes, and regarded as inevitable consequences thereof. The positive aspect and the Modern law, and ancient likeness.

principle of consensus were implicit, just as the less is contained in the greater. Thus our modern conceptions substantially obtained then ; modern principles and conclusions were then just as forcibly insisted on,—the main difference being that now our rules mostly flow from explicit agreement as representing the major premise, whereas in antiquity rules of law were not only referred to the act of agreement as their source, but largely to religion and morality as necessarily dictating an implicit acceptance or agreement ; that is, the source of the sanction implied was sought merely further back.

Difference between them.

In spite of such fundamental likenesses, however, there are, of course, many important differences between the old and the new systems, and entire conceptions of law, inasmuch as there are differences in the character of the times, in the general outlook on life, in the ideals entertained, in the circumstances of private and civic life, in the conception of State, in the notions of the relationship between the individual and the State, and, what is of extreme importance, the difference in the view entertained as to human equality and brotherhood.

The specific details of evidence showing the existence of a true international law in Greece and Rome will be dealt with later. At present it will be of advantage to refer briefly to some of the differences just indicated. What is particularly ascribed to Greece or to Rome may be regarded as concerning the other to a greater or lesser extent, unless the contrary distinctly appears.

In Greece—the State as a city-commonwealth.

In the Hellenic world, where the science of politics advanced so rapidly, we have a remarkable illustration of the ancient conception of the State as a city-commonwealth. The State was co-extensive with the city—*ἡ πόλις*. The city-state was an organized community enjoying independence, autonomy,—*αὐτονομία*, and dwelling usually within a walled town. Each city had its surrounding territory, large enough—but not unnecessarily extensive—to allow of the convenient assembly of its free citizens, for the purpose of exercising the rights and discharging the obligations incidental to citizenship.

Thus Aristotle insisted that a State should not be so large as to make it impossible or difficult for its free citizens to have ready access to each other, and be acquainted with one another.¹

Such organization is undoubtedly derived from the more primitive tribal groupings common to all the peoples constituting the Aryan family. Indeed, groupings of this kind are not strictly confined to members of this family. Amongst the Hellenic States, Athens in particular was wont to trace her greatness to the early association—*συνοικισις*² or *συνουκισμός*³—of small village communities. In the first place, a citizen was a member of, and closely associated with, his city-commonwealth, the interests of which were supreme as regards other Greek city-commonwealths. Secondly, he was a member of the Hellenic race, constituting, as regards non-Hellenes, an exclusive circle. Accordingly he had a twofold allegiance—primarily and predominantly to his city, secondarily and always in subservience to the first, to the various other members of the Greek stock. Thus in its great days and to the time of the Macedonian conquest when, after the battle of Chaeronea, 338 B.C., Philip became master of Greece, it consisted of a large number of independent and sovereign cities, jealous of each other's advancement in power and dominion, and constantly astir with dissension. But sovereignty and independence seemed at times ready to sacrifice themselves in greater or lesser measure by the formation of leagues and combinations to repel the non-Hellenic invader. It must, however, be admitted that such readiness was generally of momentary duration. Whatever efforts were made to effect a real union were invariably defeated either by the natural tendency of the several constituent States to revert to a condition of exclusiveness, or, in some cases relating to the more powerful members, to attain a position of predominance.

Tribal groupings and village communities.

Double allegiance of the Greek.

¹ *Politics*, vii. 4. 13.

² Cf. Thucydides, ii. 15.

³ Cf. Polybius, iv. 33. 7.

The Hellenic circle.

The Greek policy and the Roman difference.

Hellenic race—
assumption of
superiority.

Hellenic
community—
common
religion.

Law of nations
—evolution
possible.

Perfection within the circle, rather than extension of empire or territorial aggrandisement, was the Greek ideal. "Les Grecs n'ont jamais eu la pensée d'étendre leur domination sur le monde : leur idéal n'est pas la monarchie universelle, mais la cité."¹ This is a remarkable contrast to the Roman policy. To the Greek the mother-country was self-sufficient, it was considered an adequate sphere for the realization of his ideals, for the cherishing of metaphysical abstractions, for the worship of the beautiful, for the attainment of philosophic culture. The Roman, no less patriotic, chafed against territorial limitations, and thirsted for constant expansion of power and rule. For the Greek, intensity of the inner life and development was the aim ; for the Roman, extension of the outer circle of life and material supremacy (of which aspiration towards universal dominion is an inevitable corollary) formed the object to be attained.

The Greek race, like many other races in antiquity, in their turn, assumed its superiority to all other peoples, who were looked upon as *barbarians*, and were regarded as having been ordained and intended by nature to be the slaves of the Greeks ; and the adoption of any method to carry out this intention, be it of a forcible or of a deceitful nature, was, it was assumed, justifiable in the eyes of the gods.² To be within the Hellenic circle was to share in the common religion ; and to share in the Greek religion was *ipso facto* to be placed within the Greek pale. Though the Greeks spoke a common language, took part in the common games, consulted the same oracles, and worshipped the gods in common, yet their separation into independent city-states rendered possible the evolution of law governing the relationships between them in their capacity of sovereign powers. The position of such autonomous communities cannot be said to be fundamentally different from that, say, of the European States from the point of view of the

¹ F. Laurent, *Études sur l'histoire de l'humanité.—Histoire du droit des gens et des relations internationales* (Gand, 1850-1870), vol. ii. p. 3.

² Cf. the opinion of Aristotle, in his *Politics*, c. viii.

operativeness and applicability of an international law. It is true that the intrinsic kinship of the Greeks stamps them as practically one nation, even though subdivided into different municipalities. But international law requires for its development the existence of independent *political* communities, and not necessarily difference in race, language, religion, or anything else. The Greek States were in close proximity to each other ; but that only stimulated each to guard the more assiduously and jealously its sovereignty. To apply to the law regulating their mutual relationships the epithet *intermunicipal* law is not in reality tantamount to disclaiming the true international character of such law. There are those who, being so obsessed by "modernism," neglect, or even fail to see, the great indebtedness of modern nations to the ancient. To insist, for example, that international law is entirely of modern growth, whilst relegating Greek interstatal relationships to the category of "intermunicipal" law is to allow ourselves to be stultified by mere terminology and become slaves to mere formalism.

Existence of independent political communities.

Intermunicipal law—and international law.

No doubt the Greeks sometimes acted or spoke as though the law was applicable only to themselves and not to barbarians ; but it will be shown below in detail what a large body of the law was extended to all alike. And even if it were not so extended and applied to the Hellenes alone, its international character would still remain. We do not regard our modern law of nations to be divested of its international character simply because we do not include uncivilized races—savages, *barbarians*—in the family of nations. Further, then as now, the conduct of a people indicating a refusal to avail itself of the rights conferred by such law and perform the corresponding obligations thereby imposed, was *ipso facto* a deliberate self-elimination from the *civitas gentium* ; so that other nations recognized no duties towards it, either in time of peace or in time of war.

Extension of law of nations beyond the Greek pale.

It has been asserted and frequently repeated by various writers,—and, it is not too much to say, without

Was the law applied only to those bound by treaty?

32 SOVEREIGNTY AND EXCLUSIVENESS

their having thoroughly investigated the facts—that only those bound by an express compact owed duties towards each other, that the *ἐνσπονδοί*, that is, practically, the signatories to the treaty, were alone to benefit by the provisions of the law, whilst the *ἔκσπονδοί*, those not parties thereto, were virtually outlaws.¹ But it will be abundantly shown in the following pages that this is far from being true.

Existence of
autonomous
States ; marks
of sovereignty.

The Greek state-system offers many examples of different political constitutions. In one city-state, for instance, sovereignty was vested in a sole individual, a tyrant, whose functions and attributes varied at different times, in different places, and according to the exigency of circumstances ; in another, it was vested in constitutional monarchy ; in a third, the supreme power was exercised by an oligarchy ; whilst in a fourth it was in the hands of a democracy, in the strict sense of the term, where every free citizen had the right to an equal vote in the assembly, in all transactions relating either to the executive or to the legislative aspects of the government, *e.g.* in the election of magistrates, in the enactment of laws, in the ratification of treaties, in the declaration of war, or the conclusion of peace. Notwithstanding these wide differences in the internal political constitution, and the marked preference for, and devotion to, this or that polity, it was universally recognized in Hellas that each State, regardless of size or power, had, by virtue of its being a regularly organized community, the right of absolute autonomy, and of regulating its diplomatic relationships with the other independent States by means of its own ambassadors.²

Exclusiveness.

Patriotism and keen jealousy of foreign interference occasioned mutual distrust and an unbending spirit of

¹ *E.g.* H. Wheaton, *History of the Law of Nations* (New York, 1845), p. 5, referring to Mitford, *History of Greece*, vol. i. c. 15, § 7.

² Cf. E. A. Freeman, *History of Federal Government in Greece and Italy* (London, 1893), pp. 35-6.

opposition, which frequently led to keen strife and obstinate wars. Thus, a rigid exclusiveness prevailed. Citizenship was at first very rarely bestowed on subjects of other States, who, though fellow-Greeks, were considered aliens in the full legal and political sense of the term. The characteristic note of each city was competence and self-sufficiency. It was regarded as possessing an adequate number of citizens capable of satisfying all their national needs, and of attaining to the city's ideal, whether from the political or from the economic point of view.¹

The distinction, however, between the theory of the speculative thinker and the actual facts must be carefully recognized. "To regard the political speculations of Plato and Aristotle as fully representing the tone of political thought in Greece is like regarding the odes of Pindar as a fair expression of the waves of emotion that swayed the mixed rabble at the Olympian and Isthmian games."² Yet the philosopher, the theorizer, influenced the statesman and the legislator more in Greece than elsewhere. It could scarcely have been otherwise, as the Hellenic temperament was marked by an untiring curiosity and yearning to experience the unknown, to apply at once in practice the abstract constructions of the intellect,—so that we find in Greece, despite the comparatively brief period of time, a body of coherent doctrine in almost every department of knowledge, successive complete bodies of legislation, if not fully developed systems of law, which, unlike the Roman and the English, for example, can dispense with the necessity of being supplemented by a mass of conventions and fictions. No actual code of laws has been left to us by Greece. This was scarcely possible in view of the revolutionary spirit of her people, their uncompromising disposition, their obstinate unwillingness to

But theory to be distinguished from actual practice.

Characteristics of the Greeks.

¹ Cf. Plato, *Repub.* ii. p. 369 B ; Aristotle, *Oecon.* i. 1 ; *Polit.* iii. 5. 14 ; viii. 4. 7.

² A. H. J. Greenidge, *Handbook of Greek Constitutional History* (London, 1896), pp. 1, 2.

make allowances and concessions,—a spirit born of, and fostered by, a devotion to strict logical consistency, a spirit that was ultimately to prove their undoing.

Political unity
in Greece
impossible.

The intense patriotism of the Greeks promoted an attitude of civic seclusion. The spirit of separateness, of isolation made political unity impossible. To the Greek, his State, his fatherland was no vapid abstraction, but a living reality. He was bound to it by an almost indissoluble tie; he was ready to give up his life for it, since he was indebted to it for his privileges, for his dignity, for his very existence; so that, as self-devotion to his city's welfare was the supreme virtue, banishment was the extreme penalty. To be disinherited by the city was to be disowned by his gods. In time, no doubt, there was manifested a certain relaxation in these stringent beliefs; but the main underlying conceptions were retained even at the latest stages of Greek history. Even in regard to the colonial system, the desire for autonomy and separateness was everywhere manifested. Though a colony, established by a city, was regarded as standing in the relation of child to parent, yet the colonizing group, whilst usually recognizing certain moral obligations due to the mother-state, at once asserted its political independence.

The Greek's
life bound to
his city.

Causes of the
spirit of
exclusiveness.

Many causes contributed to produce this spirit of exclusiveness: the physical configuration of the country, making intercourse difficult; the existence of certain differences operating strongly in spite of the common foundations of Greek life,—for example, differences in religion,¹ festivals, and gods, in legal codes, in currency, in weights and measures, in the calendar, and, most significant of all causes, differences in political constitution. As Demosthenes says,² the democratic republics

¹“La nature physique a sans nul doute quelque action sur l'histoire des peuples, mais les croyances de l'homme en ont une bien plus puissante” (Fustel de Coulanges, *La cité antique*, Paris, 1900, pp. 238, 239).

²*Pro Rhod.* 8: Πρὸς μὲν γὰρ ἐλευθέρους ὄντας οὐ χαλεπῶς ἂν εἰρήνην ὑμᾶς ποιήσασθαι νομίζω, ὅποτε βουλευθείητε, πρὸς δὲ ὀλιγαρχουμένους οὐδὲ τὴν φιλίαν ἀσφαλῆ νομίζω.

contend with each other for power, for glory, but against the oligarchies they struggle for liberty, for their very existence; with free peoples peace and equality are attainable, with oligarchic governments well-nigh impossible, so that there can never be harmony between the passion for equality and the passion to predominate. Thus we get a constant and uncompromising hostility between Athens and Sparta,—the one the most powerful and frequently chosen leader of the democracies, the other that of the aristocracies. Even in the face of the common enemy, Philip of Macedon, they were actually unable to effect an amicable union. Just as expatriation is usually prohibited, often under pain of death, not only in Sparta, but in republics like Argos,¹ legitimate marriage (*ἐπιγαμία*) between citizens of different States is impossible, in the absence of a special convention;² the issue of such forbidden marriage would be regarded as illegitimate, and as possessing no rights of citizenship.³

Constant rivalries—as, for example, between Athens and Sparta.

In this unceasing rivalry, ties of kinship were disregarded, and minor differences in character or temperament became intensified. Theophrastus emphasizes the existence of such differences among the Greeks.⁴ Sometimes the general failings or peculiarities of the citizens of this or that city are held up to scorn by writers or orators, as, for example, when the Boeotians are mocked by the comic poets for their dulness and

Differences in character among the Greeks.

¹ Cf. Ovid, *Metam.* xv. 29 :

“ . . . prohibent discedere leges,
Poenaque mors posita est patriam mutare volenti.”

² Cf. Lysias, *De antiqua reipublicae forma*, 3 ; Isocrates, *Plataicus*, 51 ; Demosth. *Pro Corona*, 91.—As to similar provisions relating to the Roman *ius connubii*, cf. Gaius, *Instit.* i. 67 ; Ulpian, *Reg.* v. 4 ; Livy, xxxviii. 36 ; xliii. 3.

³ Cf. Pollux, *Onomasticon*, iii. 21 : νόθος ὁ ἐκ ξένης ἢ παλλάκιδος . . . ὃς ἂν ἐξ ἀστέως γένηται νόθον εἶναι (a law cited by Athenaeus, *Deipnosophistae*, xiii. 38) ; Demosth. *In Neaeram*, 16 ; Plutarch, *Pericles*, 37.

⁴ See the preface to his *Characters* : . . . συμβέβηκεν ἡμῖν οὐ τὴν αὐτὴν τάξιν τῶν τρόπων ἔχειν.

gluttony.¹ Sometimes a city was elated with such great pride and vanity as to become blind to the excellent qualities of others; as, for example, when Pindar was fined by his Theban countrymen for designating the Athenians "the ornament and rampart of Greece,"²—but Athens repaid him a double sum, erected a statue to him, and declared him the guest of the Republic.³

Frequent attempts at effecting a union.

The Amphictyonic league.

Other associations.

From time to time, however, a longing for union was felt. It showed itself first in the interests of religion, when leagues and associations were established between neighbouring cities for the protection or enrichment of some famous shrine lying in their midst. Of such associations the Amphictyonic league was the most notable. It grouped itself in turn about the temple of Apollo at Delphi, and about that of Demeter Amphictyonis at Thermopylae, and comprised, at one time, most of the States of Central Greece, and, in its later epoch, several of the Dorian States of the Peloponnesus.⁴ The fulfilment of the various obligations was enforced by the Amphictyonic Council, which incidentally established rules prescribing rights and duties of a non-religious character. Other associations of cities for mutual profit and defence were occasionally established, but they were imperfect and transitory. Thus the idea of Themistocles to consolidate Greece came to nothing; and a similar project of Pericles, on the eve of the Peloponnesian war, had it been realized, might have altered the course of Greek history. He had issued a decree to the effect that all Greek towns, whether in Europe or in Asia, should be invited to send representatives to a general assembly at Athens, to deliberate on the restoration of temples

¹ Cf. Eubul. ap. Athen. x. 11: . . . οὐδὲ πλήρει βροτῶν, οὐκ ἐστὶ μείζον ἀγαθόν; and again, . . . ὅλους τραχήλους.

² Pindar, *Olymp.* vi. 147 seq.

³ Aeschines, *Epist.* 4; Isocrates, *De permut.* 166.

⁴ See G. de Sainte-Croix, *Des anciens gouvernements fédératifs* (Paris, 1798), c. vii.

destroyed by the barbarians, on the sacrifices vowed to the gods in connection with the Persian wars, and on the best means of assuring to all freedom and security of navigation, and of establishing general peace. But this proposal came to nothing owing to Sparta's jealousy of Athens, and her apprehension that an Athenian hegemony might result.¹ Indeed the temporary confederations that were set up proceeded under the leadership, if not virtual supremacy, of one or other of the more powerful States. Aristocracies and democracies found it impossible to be allied on a footing of real equality; the diversity occasioned by the Dorian and Ionian elements in Hellas could not be eliminated. It was, in truth, easier to subjugate a city and occupy its territory, than to retain it in friendly union.

Confederations—and hegemony.

The Greeks as Greeks cherished aspirations for unity, but as citizens their constant aim was decentralization; and the claims of citizenship invariably triumphed over those of kinship. Although their genius was so versatile, and, in a sense, cosmopolitan, they found free scope for its exercise within the circumscribed limits of their respective city-states. They constructed no great works of engineering skill, as the Romans had done. Their concern was with the conquest of the intellectual dominions, rather than with the establishment of territorial empire. Their nature is characterized by τὸ φιλομαθές²—the love of knowledge—as a contrast, for example, to the love of wealth attributed to the Phoenicians and Egyptians. They may have proved incapable of political unity, but they were possessed of that intellectual unity which marks the true civilization of a people.³

The Greeks as a race—and the Greeks as citizens of different States.

The mission of Athens, as conceived by ancient writers, is not merely to open men's eyes to light and

The mission of Athens.

¹ Plut. *Pericl.* 17.

² Plato, *Repub.* iv. 435 E.

³ Cf. F. Laurent, *op. cit.* vol. ii. p. 18: "Si l'unité politique leur a manqué, ils ont eu l'unité intellectuelle qui constitue la civilisation d'un peuple."

beauty, but to disseminate amongst wretched humanity the nourishing fruit of the earth,¹ to teach them of the bounteous gifts of Ceres. “. . . Athens showed such love for men as well as for the gods that when she became the mistress of these great blessings [*i.e.* the gifts of the Earth, and also mystic rites] she did not grudge them to the rest of the world, but shared her advantages with all.”² She is further represented as having shown the Greeks high examples of charity and consideration for others, and as having taught them “not to refuse any one the use of running water, or permission to light his fire at the hearth of his neighbour.”³

Hellenic
temperament
—its capri-
ciousness.

But the Hellenic temperament was in many respects changeable and capricious; and the practices of Greeks frequently diverged far from their doctrines. Polybius, in his comparison of the Roman Republic with other States and constitutions, points out that Athens having attained its highest perfection under Themistocles, suffered a rapid decline afterwards owing to the fundamental instability of the Athenian disposition—. . . διὰ τὴν ἀνωμαλίαν τῆς φύσεως. For the Athenian demus, continues Polybius, is always in the position of a ship without a commander,—αὐτὴ γὰρ ποτε τὸν τῶν Ἀθηναίων δῆμον παραπλήσιον εἶναι συμβαίνει τοῖς ἀδεσπότοις σκάφεσι; its discord and quarrels present a sorry spectacle to observers; for in Athens, as in Thebes, a mob manages everything on its own unfettered impulse.⁴

Ancient view
as to Spartan
duplicity.

As to Sparta, her duplicity, in the view of ancient writers, is proverbial. Athens often accused her rival of thinking one thing and saying another, as Herodotus remarks—. . . ἄλλα φρονοῦντων καὶ ἄλλα λεγόντων;⁵ and Euripides puts into the mouth of Andromache, in her

¹ Lucretius, *De rerum nat.* vi. 1 *seq.*

² Isocrat. *Panegy.* 29: οὕτως ἡ πόλις ἡμῶν οὐ μόνον θεοφιλῶς ἀλλὰ καὶ φιλανθρώπος ἔσχεν, ὥστε κυρία γενομένη τοσοῦτων ἀγαθῶν οὐκ ἐφθόνησε τοῖς ἄλλοις, ἀλλ' ὧν ἔλαβεν ἅπασι μετέδωκεν.

³ Plut. *Cimon*, 10.

⁴ Polyb. vi. 44.

⁵ ix. 53.

denunciation of Menelaus, expressions of severe censure : " O ye inhabitants of Sparta, most hated of mortals among all men, crafty in counsel, kings of liars, concocters of evil plots, crooked and thinking nothing soundly, but all things tortuously, unjustly are ye prosperous in Greece. . . . Are ye not detected speaking ever one thing with the tongue but thinking another ?" ¹

The external policy of the Greeks in general was extremely variable. In the democracies, the foreign policy became the less stable and conscientious the greater the power acquired by the sophists in the assemblies and the courts. In aristocracies like Sparta, an external policy, at least in a positive sense, can scarcely be said to exist at all. Lycurgus had prohibited not only commercial intercourse with foreigners,² but navigation generally ;³ foreigners were expelled,⁴ and Spartans were forbidden to go abroad. Later, the foreign trade was mainly in the hands of the *perioeci*. Sparta's military ideal was inconsistent with foreign commercial relationships. As Montesquieu remarks : " Lacédémone était une armée entretenue par des paysans " ⁵ Her institutions, her poetry, her religion all conduced to promote the military spirit. Plato thus makes an Athenian address a Spartan : " By your institutions you resemble soldiers in a camp rather than citizens in a city." ⁶

External policy of the Greeks—variable.

Attitude to aliens in the aristocracies, e.g. Sparta.

¹ Eurip. *Androm.* 466 seq. (445 seq., ed. Nauck) :

ὃ πᾶσιν ἀνθρώποισιν ἐχθιστοὶ βροτῶν
Σπάρτης ἔνοικοι, δόλια βουλευτήρια,
ψευδῶν ἀνακτες, μηχανορράφοι κακῶν,
ἐλικτὰ κούδεν ὕγιες, ἀλλὰ πᾶν περίξ
φρονούντες, ἀδίκως εὐτυχεῖτ' ἀν' Ἑλλάδα.
..... οὐ λέγοντες ἄλλα μὲν
γλώσση, φρονούντες δ' ἄλλ' ἐφευρίσκεσθ' αἰεῖ ;

² Plut. *Lycurg.* 9.

³ Plut. *Instit. Lac.* 42.

⁴ Plut. *Lycurg.* 27 ; *Instit. Lac.* 19.

⁵ *De l'esprit des lois*, xxiii. 17.

⁶ *Laos*, ii. 666 π : . . . στρατοπέδου γὰρ πολιτείαν ἔχετε, ἀλλ' οὐκ ἐν ἄστοις κατ' ἀφ' ἑαυτῶν . . .

Antipathy
to foreigners—
general.

“Barbarians.”

There was everywhere and at all times a greater or lesser antipathy to foreigners,—to dwellers outside the Greek circle.¹ The citizens of one city regarded those of another as aliens in the narrower political sense ; but non-Hellenes were considered barbarians,—aliens not only in the political sense, but also in the intellectual and moral, and what is still more important, in the ethnic and religious sense. Greek patriotism had always the religious motive underlying it. Thucydides frequently refers to the gods and temples common to the Hellenes—τὰ ἱερὰ τὰ κοινὰ τῆς Ἑλλάδος,²—θεοὺς τοὺς ὁμοβωμίους καὶ κοινούς τῶν Ἑλλήνων ;³ and when Aristophanes urges his countrymen to cease their intestine struggles, he makes use of such phraseology as this :

... οἱ μῶς γε χέρνιβος
βωμὸν περιβραίνοντες, ὥσπερ ξυγγενεῖς. . . .⁴

When the Persians offered the Athenians their alliance, the reply, as drawn up by Aristides, was to the following effect : “ There is not enough gold on the earth, no land fine or rich enough, nothing whatever which can induce us to take the part of the Medes to reduce Greece to slavery. . . . The Hellenic race being of one blood, speaking the same language, having the same gods, temples, sacrifices, customs, and usages, it would be shameful of Athenians to betray it.”⁵

Barbarians
deemed fit only
for slavery.
(In theory.)

Thus Aristotle held that barbarians were destined by nature to be the slaves of the Greeks : Διὸ φασιν οἱ ποιηταὶ : “ βαρβάρων δ’ Ἑλλήνας ἄρχειν εἰκὸς,” ὥς ταὐτὸ φύσει βάρβαρον καὶ δοῦλον ὄν.⁶ And originally (not to enter here into any distinctions which will be later set

¹ Cf. Dion. Hal. i. 31 ; iv. 25. ² iii. 58. ³ iii. 59 ; v. 18.

⁴ *Lysistrata*, 1130-1.

⁵ Herodot. viii. 144 : ὅτι οὔτε χρυσὸς ἐστὶ γῆς οὐδαμῶθι τοσούτος, οὔτε χώρα κάλλει καὶ ἀρετῇ μέγα ὑπερφέρονσα, τὰ ἡμεῖς δεξάμενοι, ἐθέλομεν ἂν μηδίσαντες, καταδουλώσαι τὴν Ἑλλάδα. . . . αὐτίς δὲ, τὸ Ἑλληνικὸν ἐν ὁμαιμόν τε καὶ ὁμόγλωσσον, καὶ θεῶν ἱδρύματά τε κοινὰ καὶ θυσίαι, ἡθεὶς τε ὁμότροπα. τῶν προδότας γενέσθαι Ἀθηναίους οὐκ ἂν εἰς ἔχοι. Cf. Plut. *Aristid.* 10.

⁶ *Polit.* i. 1. 5.

forth) with the Romans as well as with the Greeks, the expressions for stranger, barbarian, and enemy were sometimes used as synonymous. At the assembly of the Aetolians (called the Panaetolium) one of Philip's ambassadors, in the course of a speech directed against foreigners getting a footing in the country, said: "With foreigners, with barbarians, all Greeks have and ever will have eternal war, which is always the same, and not from causes which change with the times."¹

But different sentiments were not infrequently expressed as to the virtue and desirability of equality. Thus Jocasta, addressing her son Eteocles, says: "It is nobler, my son, to honour equality, which ever links friends with friends, and States with States, and allies with allies; for equality is sanctioned by law among men."² And so there were from time to time protests against slavery.

There is to be found a similar antagonism to people outside the pale, in every part of the ancient world. Thus in China there was a bond of sympathy between the various constituent States, but active hostility against the "barbarians." For example, in the middle of the seventh century, B.C., when "the Tartars of the north-west presented themselves at the court of Tsin, requesting a treaty of peace and amity, and humbly offering to submit to be treated as vassals of the more enlightened Power, 'Amity,' exclaimed the prince, 'what do they know of amity? The barbarous savages! Give them war as the portion due to our natural enemies.'"³

¹ Livy, xxxi. 27: "cum alienigenis, cum barbaris aeternum omnibus Graecis bellum est eritque; natura enim quae perpetua est, non mutabilibus causis hostes sunt."

² Eurip. *Phoeniss.* 536 seq.:

... κείνο κάλλιον, τέκνον,
ισότητα τιμᾶν, ἢ φίλους ἀεὶ φίλοις
πόλεις τε πόλεσι συμμάχους τε συμμάχοις
συνδεῖ· τὸ γὰρ ἴσον νόμιμον ἀνθρώποις ἔφην, ...

Cf. Eurip. *Fragm.* 60; Thespis, *Fragm.* 6.

³ W. A. P. Martin, "Traces of international law in Ancient China" in *International Review*, New York, vol. xiv. (1883), p. 69.

Aspirations
to equality.

Antagonism
to people
beyond the
pale—
universal.

Interest of
the State—
the supreme
consideration.

The interest of the State was everywhere the supreme consideration. The theory was that the citizens existed for the State ; their lives and fortunes were to be at its absolute disposal ; even the incidents and concerns of private life were not to be free from its dominance ; that citizenship entirely absorbed individuality. This conception in its most rigorous form prevailed in Sparta. In actual life, however, the theory was never fully realized. The individual was never to this extent merged in the State. He was never merely a civic automaton. There were always relaxations in the theoretical relationship between the State and the individual. There were always opposed to this abstraction a variety of facts to which most modern writers, apparently led away by the speculative imaginings of the ancient philosophers, have failed to give adequate consideration. State interest may be actually of supreme moment, and yet not to the extent of annihilating the subject's individuality. The pride of nationality or citizenship was never really set above individual virtue. "It is not your city which ennobles your race, it is you who ennoble your city by good actions."¹

Civic
duty—and
individual
virtue.

¹ Philemon, *Fragm.* ed. Didot: οὐχ ἡ πόλις σου τὸ γένος εὐγενὲς ποιεῖ, σὺ δ' εὐγενίζεις τὴν πόλιν πράσσων καλῶς.

CHAPTER II

GREEK CONCEPTION OF LAW.—TO WHAT EXTENT THE GREEKS RECOGNIZED AN INTERNATIONAL LAW

ANCIENT law is an embodiment of categorical commands without assigning reasons therefor. It is an imposition of unquestioned sovereign authority which sees no necessity for elucidation by argument or comment in preambles or otherwise ; and this sovereign authority ultimately lies with the gods. In the early ages, law and religion were so closely interwoven that it is difficult to say where religion ends and law begins.

General nature
of ancient law.

✓ Indeed, law is religion as applied to the social, civic, and political life. To commit an infraction of the law is to commit an offence against the gods, who must be then duly appeased. For the gods are deemed to be themselves the originators of the laws. Thus the Lacedaemonians regarded Apollo, not Lycurgus, as their real law-giver ; the Cretans attributed their laws to Jupiter, not to Minos. Again the Romans believed that Numa had written simply at the dictation of the goddess Egeria, whilst the Etruscans derived their legislation from Tages.

Law and
religion.

But the gods are not always consistent,—they are often given to caprice and self-contradiction. They are regarded as unchanging in themselves, though their behests often vary with the varying circumstances and ideals of their devotees. However, their seemingly superseded commands are not in reality abrogated ; they remain side by side with the new or modified

The ancient
gods not always
consistent.

Mere addition
of new laws
rather than
abrogation.

dispositions. Complete nullification would be a stigma, involving an acknowledgment of imperfect wisdom. Thus, in the code of Manu the earlier law establishes the right of primogeniture ; later, another law prescribes equal division amongst the sons, without necessarily cancelling the previous provision. Again, Solon's code did not of necessity abolish Draco's ; there may have been in the later law a tacit assumption of the non-applicability of the Draconian legislation, but there was no formal act indicating its abrogation.¹

Ready
obedience to
the laws.

Religion and
law—twin
companions.

In every case to serve the laws is, as Plato insists, to serve the gods.² In the *Crito*, Socrates is represented as laying down his life because the laws demand it of him ; disobedience would be sacrilege. Ihering,³ discoursing on the influence of religion on law, terms them twin companions, which, in their early stages of evolution, are in constant communion aiding and supplementing one another ;—"Recht und Religion sind ein Zwillingsspaar, das überall, wohin wir in der Geschichte blicken, seine Kinderjahre in innigster Gemeinschaft verbringt, sich gegenseitig helfend und ergänzend." For a long time did laws retain their sacred character. In Rome it was not thought sufficient for the unanimous decision of the people to make a law ; it was necessary for the pontiffs to give their approval, and for the augurs to attest that the gods were propitious respecting the proposed law. As Dionysius says :⁴

¹ Cf. Andocides, *De mysteriis*, 83 : "Ἐδοξε τῷ δήμῳ, Τισαμενὸς εἶπε, πολιτεύεσθαι Ἀθηναίους κατὰ τὰ πάτρια, νόμοις δὲ χρῆσθαι τοῖς Σόλωνος, . . . χρῆσθαι δὲ καὶ τοῖς Δράκοντος θεσμοῖς, ὅσπερ ἐχρώμεθα ἐν τῷ πρόσθεν χρόνῳ.—See also Pollux, ix. 61 ; Demosth. *In Leptinem*, 158 ; *In Evergum*, 71.—Aulus Gellius thus comments on the disuse of the Draconian code : "Draconis leges, quoniam videbantur acerbiores, non decreto iussoque, sed tacito illiteratoque Atheniensium consensu, obliteratae sunt" (xi. 18).

² *Laws*, vi. 762 z.

³ *Geist des römischen Rechts*, vol. i. pp. 256 seq. ; cf. Fustel de Coulanges, *La cité antique*, *passim*.

⁴ ix. 41 : τὰς μὲν φρατριακὰς ψηφοφορίας ἔδει προβουλευσαμένης τῆς βουλῆς καὶ τοῦ πλήθους κατὰ φράτρας τὰς ψήφους ἐπενέγκαντος,

"In order to render the resolutions taken in the assemblies of the *curiae* valid, it was necessary that the senate should make the previous order, and that the people voting in their *curiae* should confirm it, and that, besides both these proceedings, the heavenly signs and auspices should not oppose it." Only with the Republic did this procedure fall into desuetude. On one occasion when the tribunes of the plebs proposed the adoption of a law passed by an assembly of the tribes, a patrician said to them: "What, then, is there you can now pretend to take part in that requires sacrifices and holy rites, to which the law appertains?"¹ Fustel de Coulanges thus sums up the relationship between ancient law and religion: "Chez les Grecs et chez les Romains, comme chez les Hindous, la loi fut d'abord une partie de la religion. Les anciens codes des cités étaient un ensemble de rites, de prescriptions liturgiques, de prières, en même temps que de dispositions législatives. Les règles du droit de propriété et du droit de succession y étaient éparses au milieu des règles relatives aux sacrifices, à la sépulture et au culte des morts."²

During the Roman Republic the religious aspect tends to disappear.

Relation between ancient law and religion.

Religion everywhere permeated the public and private lives both of the Greeks and of the Romans,—at least in their earlier history. The religiousness of the Athenians was particularly notable. Xenophon says they had more religious festivals than any other Greek people,³ and Sophocles makes one of his characters say that Athens is the most pious of cities, and that if any land knows how to worship the gods with due rites, this land excels therein.⁴ Plato often refers to the

Athenian religiousness.

καὶ μετ' ἀμφοτέρω ταῦτα τῶν παρὰ τοῦ δαιμονίου σημείων τε καὶ οἰωνῶν μηδὲν ἐναντιωθέντων, τότε κυρίας εἶναι.

¹ Dion. Hal. x. 4: τίνος οὖν ὑμῖν ἔτι μέτεστι τῶν ἱερῶν καὶ σεβασμοῦ δεομένων, ὃν ἔν τι καὶ ὁ νόμος ἦν. . . . Livy likewise refers to the incapacity of the plebs and the tribunes to establish a law—" . . . nec plebem nec tribunos legem ferre posse" (ii. 41).

² *Op. cit.* p. 218.

³ *Resp. Ath.* iii. 2; cf. Pausanias, i. 24.

⁴ *Oedip. Col.* 1007-8:

. . . εἰ τις γῇ θεοὺς ἐπίσταται
τιμαῖς σεβίζειν, ἦδε τῷδ' ὑπερφέρει.

numerous religious processions and sacrifices of his fellow-citizens, and in one place gives a significant hint as to the value of mere formalities as such. The Lacedaemonians having gained several successive victories over the Athenians, the latter despatched envoys to the shrine of Ammon to inquire why success was not vouchsafed to them by the gods. "We (they were to say) offer them more and finer sacrifices than any other Hellenic State, and adorn their temples with gifts, as nobody else does; moreover we make the most solemn and costly processions to them every year, and spend more money in their service than all the rest of the Hellenes put together." To which Ammon replied: "The silent worship of the Lacedaemonians pleaseth me better than all the offerings of the other Hellenes."¹

Ancient
sanction of
positive law.

In early times the *raison d'être* of a law was for the most part associated with its divine origin; as such the consequences of its application were looked upon as right and inevitable,—whereas in more modern times the criterion of a law's validity is in the people's acceptance of its imposition, and of the consequences it entails. The ancients judged the results by the law; the moderns judge the law by the results. If the expression may in this connection be applied, it may be that the ancient law is subjective, the modern objective.²

Was there
international
law among the
ancients?
Denied by
many writers:
Kent.

Had the ancients international law? Various modern writers have expressed very disparaging opinions concerning ancient international law. Thus Kent, in his

¹ *Alcibiades*, ii. 148, 149: . . . οἱ πλείστας, φάναι, μὲν θυσίας καὶ καλλίστας τῶν Ἑλλήνων ἄγομεν, ἀναθήμασί τε κεκοσμήκαμεν τὰ ἱερὰ αὐτῶν ὥς οὐδένας ἄλλοι, πομπάς τε πολυτελεστάτας καὶ σεμνοτάτας ἰδωρούμεθα τοῖς θεοῖς ἀν' ἕκαστον ἔτος καὶ ἐτελοῦμεν χρήματα, ὅσα οὐδ' οἱ ἄλλοι ξύμπαντες Ἕλληνες . . .

. . . φησὶν ἀν' βούλεσθαι αὐτῷ τὴν Λακεδαιμονίων εὐφημίαν εἶναι μᾶλλον ἢ τὰ ξύμπαντα τῶν Ἑλλήνων ἱερὰ.

² Cf. M. Müller-Jochmus, *Geschichte des Völkerrechts im Altertum* (Leipzig, 1848), p. 226: "Der Unterschied zwischen dem antiken und modernen Rechtzustände besteht darin, dass das Recht in der alten Welt überhaupt subjectiv war, in der neuen zur Objectivität gekommen ist."

Commentary on International Law, stated that even the most civilized States amongst the ancients seem to have had no conception of the moral obligations of humanity and justice between nations, and that no such thing as the science of international law obtained amongst them.¹ Vergé, in his Introduction to the French edition of Martens' *Précis*, says that the ancient world had not grasped the fundamental notion of the law of nations, that it had no regard for man as man, or for territorial rights; that when a nation became powerful it invaded the country of others, when it became weak it sought a treaty of peace; that the stranger was regarded as an enemy or, at least, as a spy; that the normal state of nations was war, during which everything was deemed permissible; that religious and political exclusiveness characterized all international relationships.² The same writer adds that even when treaties were entered into they were not respected; and so far as ambassadors are concerned, the privilege of inviolability was accorded to them not through any legal sanction, but simply through religious sentiment.³ According to Laurent:⁴ Laurent.

"Les Grecs bien que frères [referring to an expression of Plato], ne se croyaient liés ni par le droit ni par l'humanité; ils ne se reconnaissaient d'obligations

¹ P. 11.

² G. F. de Martens, *Précis du droit des gens moderne* (Paris, 1864), vol. i., Introd. by C. Vergé, p. viii: "C'est que l'idée-mère du droit des gens ne s'était pas encore manifestée dans le monde. . . . Quant au respect pour la qualité d'homme, pour l'inviolabilité des territoires, il n'en était pas question: l'exclusivisme religieux et politique, tel était alors le fondement des relations internationales. Quand un peuple se croyait le plus fort, il envahissait; quand il se sentait le plus faible, il demandait à traiter; l'étranger était un ennemi, ou tout au moins, un espion. En temps de guerre chacun se croyait tout permis; injuste dans ses origines, barbare dans ses procédés, la guerre était l'état normal des populations anciennes, comme la paix semble devoir être l'état normal des nations modernes."

³ *Ibid.* p. 60: "... Les traités n'étaient point respectés, et l'inviolabilité des ambassadeurs tenait moins au respect du droit qu'à un sentiment religieux fortifié par des serments et des sacrifices."

⁴ *Op. cit.* vol. ii. p. 117.

Maury.
Guizot.

Wheaton.

récioproques que lorsqu'un traité les avait stipulées. La notion de devoirs découlant de la nature de l'homme reconnue par les philosophes n'entra pas dans le domaine des relations internationales." This statement is cited without question or discussion or personal investigation by Maury,¹ and the same conception is entertained by Guizot :² " Dans l'antiquité païenne, même sur ses plus beaux théâtres et dans ses plus beaux jours, les étrangers étaient des ennemis. A moins que des conventions particulières et précises n'eussent été conclues entre deux nations, elles se considéraient comme absolument étrangères l'une à l'autre et naturellement hostiles. La force présidait seule à leurs rapports ; le droit des gens n'existait pas. A peine les plus grands esprits de l'antiquité, Aristote et Cicéron, en ont-ils conçu quelque idée ; à peine rencontre-t-on dans l'histoire entre les Etats divers quelques instincts vagues et passagers de droits et de devoirs mutuels." Again, Wheaton, following Mitford, asserts that the Greeks considered they had no obligations to other States apart from those regulated by an express compact ; that the *ἐνσπονδοί*, the parties to the contract, alone benefited by the rights and obligations thus agreed upon, and that the *ἔκσπονδοί*, the States not parties thereto, were in the position of outlaws. Further, it is urged that in the ancient world the law of might was universal ; that (on the authority of Cicero³ and Plutarch⁴) the Athenians publicly contended that all lands bearing wheat or olives belonged to them of right ; that even Aristides the Just (whom Plato had placed above Themistocles, Cimon, and Pericles⁵) was guided by State interest rather than by justice ;⁶ that the genius of Plato constructed the noblest theory of the just and the beautiful, but when he applies his ideas to the law of nations, he draws a distinction between the Hellenes and the barbarians ; that

¹ A. Maury, *Histoire des religions de la Grèce antique*, 3 tom. (Paris, 1856-9), t. iii. pp. 401-2.

² *L'église et la société chrétiennes en 1861* (Paris, 1861), c. xiv. p. 101.

³ *De Repub.* iii. 9. ⁴ *Alcib.* 15. ⁵ *Plut. Aristid.* 25. ⁶ *Ibid.*

this narrow attitude of State interest, irrespective of all other considerations, represents "le dernier mot de l'antiquité sur la justice internationale."¹ Finally, the argument has been advanced that owing to the all-pervading influence of religion in antiquity, whatever rules existed to regulate international relationships were always based on the sacred law, and formed an integral portion of it, so that a body of rules resting on such "geringe Stufe,"² as a German writer slightly puts it, Heffter, can scarcely be considered the "law of nations."

Now all this criticism is largely untenable. It is extreme and one-sided. It fails to take due account of the differences in ancient conditions, of the circumstances surrounding earlier stages of evolution in general, and of legal development in particular. It sees imperfections and deficiencies in a system of things, and forthwith condemns the entire system. It sees arbitrary or cruel acts in this or that quarter, at this or that epoch, and the conclusions it jumps at are immediately applied to all times and places in the ancient world. It regards the speculative constructions of the philosophers proceeding in their tentative argument in accordance with a given ideal and from certain postulated premises, and lays hold of sundry implications and conclusions thereof, which,—failing to exercise any rational discrimination,—it immediately takes to represent the real facts and conditions of the time. Besides adverse critics for the most part speak as though modern international law is a perfect science, comprising a fully systematized body of universally accepted doctrines. But, in spite of our boasted advance of twenty centuries beyond the Greeks and the Romans, there are those who deny that there exists even to-day any international law at all, at least

Objections to
these writers'
criticism.

¹ Laurent, *op. cit.* t. ii. p. 190.

² A. W. Heffter, *Das Europäische Völkerrecht der Gegenwart*, ed. F. H. Geffcken (Berlin, 1881), p. 12: "Will man nun dieses das Völkerrecht der alten Welt nennen, so lässt sich nicht widersprechen; gewiss stand es auf sehr geringer Stufe; es war ein Teil des Religionsrechts aller oder doch bestimmter Nationen."

in the strict sense of law. For example, quite recently a member of parliament, who is also a lawyer conversant with international law, said in the House of Commons : "What moment had Mr. Asquith chosen to forsake the two-Power standard, and in Dreadnoughts barely to maintain a one-Power standard ? He had chosen a moment when the public law of Europe was not worth the documents on which its precepts were inscribed, when treaties were torn up at the dictation of armed power, when cold and undisguised aggression pursued its course without hindrance or correction." If this be true then it is, to say the least, ridiculous to assume a censorious attitude with regard to the ancient law of nations. In any case, this cited statement is (making due allowance for its consisting in rhetorical flourish), no more erroneous than the unqualified captious observations of the above-mentioned and similar writers.

Difficulty
in making
generaliza-
tions.

Where human beings and human affairs are concerned, generalizations of an extreme character are never true. Hyperbole hinders the arrival at truth no less effectually than superficial investigation or traditional prejudice. International law, if it is or can be a science at all, is, or can be, at most, a *regulative* science, dealing with the conduct of States, that is, human beings in a certain capacity ; and its principles and prescriptions are not, like those of science proper, final and unchanging. The substance of science proper is already made for man ; the substance of international law is actually made by man,—and different ages make differently.

Existence
of elements of
international
law in Greece
and Rome.

Ample evidence will, it is hoped, be adduced in the following pages to prove that more than mere rudiments of an international law existed in ancient Greece and Rome ; that the ancients were by no means entirely indifferent to the moral obligations of justice and humanity between peoples, that they were not regardless of the elementary rights of the individual, that the stranger was not necessarily looked upon as an enemy or a spy, that the normal state of nations was not war,

—unless this refers to the assumption of a certain hostile attitude towards the barbarian. But such attitude was not in reality (apart from utterances of a merely theoretical description) any more hostile than that of the modern civilized States with respect to the uncivilized peoples. Further, it will be seen that the *ἔκσπονδοι* were not deemed outlaws, that liberty to break treaties was no more admitted than it is now. The modern misapplication of the terms *ἐνσπονδοι* and *ἔκσπονδοι* is generally due to disregard of the fact that “peace” with the Greeks, as with the Romans, meant two things: in the first place, a formal treaty of peace, a peace by covenant, concluded with solemn ceremonial, with the indispensable oaths and libations; and secondly, it implied the natural and ordinary condition of civilized human beings and regularly organized communities.

Real
meaning of
ἔκσπονδοι
and
ἐνσπονδοι.

And as to the argument that because a certain code of conduct in international relations draws its sanction from religion, it cannot therefore be described as possessing the character of *international law*, the answer is that it is of no consequence at all where the sanction lies; since the fundamental question is whether there is a generally admitted rule regulating certain international relationships, and whether there exists any potent sanction whatever similarly recognized as enforcing the observance of that rule. The religious sanction did not impair but added force to the legal and political sanction. Religion in antiquity was co-extensive with the whole of life; it did not form merely a portion of it set apart for some small section of the week or year; it was at the bottom of law, because it was at the bottom of life; and the admitted insistence and protection of the law by the gods, in view of its general acceptance by men, does not necessarily deprive it of its character as law. The juridical nature of ancient rules obtaining between States is attested by their consciousness of being bound by the obligations implied, by their regarding the due observance thereof as just, and violation unjust and punishable. And these rules are capable of international application,

Does
connection
with religion
destroy the
character of
international
law?

Juridical
nature of
ancient rules.

as soon as there is a general recognition of the juridical equality and reciprocity of States. This condition was not wanting, at least in the case of the constituent States of the Hellenic circle, and in that of Rome during her first period of history, that is to the end of the second Punic war.

Usage as a
source of the
law of nations.

Is Laurent's
criticism
valid?

Laurent, curiously enough, puts aside the rules established by usage, "les règles que l'usage a établies pour les relations des peuples," as not being of sufficient importance, and not deserving of being raised to the "dignité d'une science." Now in default of such usages, the outstanding source of international law would, of course, be express compacts, embodied in documents, definitely prescribing the rights and duties of the parties thereto; and, what is still more curious, of the numerous important diplomatic instruments which were in existence at the time he wrote (for example, the compilation of Barbeyrac giving the actual text of, or otherwise indicating, some five hundred public treaties, etc., concluded before the Christian era), not a line is specifically quoted by him. Thus, in the one case an attempt is made to support an argument by means of a *petitio principii*, in the other by a suppression or disregard of relevant testimony of vital significance.

The
νόμος
'Ελλήνων.

No sharp
distinction
between
public and
private law.

The political constitution of the Greek States was for them the primary object of consideration. Legislative activity was thought to be subservient to the preservation of the fundamental elements of the constitution. Laws, private or public, were regarded as essential not (as the Romans mainly considered it) to adjust the relationships of individuals, but as a means of supporting the constitutional structure. And so, notwithstanding certain apparent differences between private and public procedure in many of the Greek States, and particularly in Athens, there was no hard-and-fast distinction between private and public law. It was clearly perceived, however, that different societies possessing differently organized constitutions, would need different laws;

but in so far as they were communities of civilized human beings, certain laws would be common to all, as their applicability is inevitably determined by universal nature. Hence the distinction between private or particular law, *ἴδιος νόμος*, and common or universal law, *κοινὸς νόμος*; and it is this *κοινὸς νόμος* which is the great source of the law between nations.¹

Aristotle, in his *Rhetoric*, thus notes the difference : Aristotle on "universal" and "particular" law.
 "I regard law as either particular or universal, meaning by 'particular' the law ordained by a particular people for its own requirements, and capable of being sub-divided into written and unwritten law, and by 'universal' the law of nature. For there exists, as all men divine more or less, a natural and universal principle of right and wrong, independent of any mutual intercourse or compact."²
 He further alludes to the principle to which Sophocles makes Antigone appeal when she avows that it is right to bury Polynices in defiance of Creon's edict, because it is right in accordance with the law of nature :

οὐ γάρ τι νῦν γε κάχθες, ἀλλ' αἰεὶ ποτε
 ἔῃ ταῦτα, κοῦδεις οἶδεν ἐξ ὅτου' φάνη.³

(Not of to-day nor yesterday is this a law, but ever hath it life,
 and no man knoweth whence or how it came.)

Aristotle goes on to refer to Empedocles who, insisting that it is wrong everywhere to put any living thing to death, says :

ἀλλὰ τὸ μὲν πάντων νόμιμον διὰ τ' εὐρυμέδοντος
 αἰθέρος ἡνεκέως τέταται διὰ τ' ἀπλέτου αἰ' γῆς.⁴

(The law universal doth evermore pervade the omnipotent
 heaven and the boundless earth.)

It is to be observed that in the tenth chapter, Aristotle similarly dividing law into particular (*ἴδιος*), and uni-

¹ On the conception of the Hellenic *κοινὸς νόμος*, see A. Bonucci, *La legge comune nel pensiero greco* (Perugia, 1903).

² *Rhet.* i. 13: Λέγω δὲ νόμον τὸν μὲν ἴδιον τὸν δὲ κοινόν, ἴδιον μὲν τὸν ἐκάστοις ὁρισμένον πρὸς αὐτοὺς, καὶ τοῦτον τὸν μὲν ἀγραφον τὸν δὲ γεγραμμένον, κοινὸν δὲ τὸν κατὰ φύσιν. ἔστι γάρ, ὃ μαντεύονται τι πάντες, φύσει κοινὸν δίκαιον καὶ ἀδίκον, κἂν μηδεμία κοινωνία πρὸς ἀλλήλους ἢ μηδὲ συνθήκη. . . .

³ Soph. *Antig.* ll. 456-7.

⁴ *Περὶ Φύσεως*, ll. 380-1, ed. Sturz.

versal (*κοινός*), defines particular law as the written law, the statutes of any given State, and universal law as the unwritten (*ἄγραφος*), but universally recognized principles of morality.¹ The universal or unwritten law of this latter classification corresponds to the universal law or law of nature of the former, where particular is further subdivided into written or statutory law, and unwritten, comprising such principles of equity, derived from custom and usage, as possess juridical force, and adopted to supplement or rectify, in any manner that appears desirable, the written law. On more than one occasion Demosthenes compares the written law, τὸν γεγραμμένον νόμον, with the law common to all men, τὸν κοινὸν ἀπάντων ἀνθρώπων.²

The written law, and the common law of mankind.

Natural and conventional justice.

The same distinction is drawn elsewhere:³ "Civil justice is partly natural, and partly conventional; that is natural which possesses the same validity everywhere, and does not depend on being deliberately adopted or not; while that is conventional which in the first instance does not matter whether it assumes one form or another, it matters only when it has been laid down, for example, that the ransom of a prisoner should be a mina. . . ."

In his *Politics*, Aristotle states that customary laws have intrinsically more force, and pertain to more important matters, than written laws; and that a man may well be a safer ruler than the written law, but not safer than the customary law.⁴

Force of custom.

The well-known maxim of Pindar, which is quoted

¹ *Rhet.* i. 10: νόμος δ' ἐστίν, ὃ μὲν ἴδιος, ὃ δὲ κοινός. λέγω δὲ ἴδιον μὲν καθ' ὃν γεγραμμένον πολιτεύονται· κοινὸν δὲ ὅσα ἄγραφα παρὰ πᾶσιν ὁμολογεῖσθαι δοκεῖ.

² Cf. for example, *c. Aristoc.* 61.

³ *Nic. Eth.* v. 10: τοῦ δὲ πολιτικοῦ δικαίου τὸ μὲν φυσικόν ἐστι τὸ δὲ νομικόν, φυσικὸν μὲν τὸ πανταχοῦ τὴν αὐτὴν ἔχον δύναμιν, καὶ οὐ τῷ δοκεῖν ἢ μή, νομικὸν δὲ ὃ ἐξ ἀρχῆς μὲν οὐθεν διαφέρει οὕτως ἢ ἄλλως, ὅταν δὲ θῶνται, διαφέρει, οἷον τὸ μνάς λύτρονσθαι. . . .

⁴ *Pol.* iii. 16. 9: ἔτι κυριώτεροι καὶ περὶ κυριωτέρων τῶν κατὰ γράμματα νόμων οἱ κατὰ τὰ ἔθνη εἰσίν, ὥστ' εἰ τῶν κατὰ γράμματα ἄνθρωπος ἀρχὴν ἀσφαλέστερος, ἀλλ' οὐ τῶν κατὰ τὸ ἔθος.

by Herodotus,¹ that "custom is the king of all things," νόμον πάντων βασιλέα, was at first taken to refer to the fact that usage makes a certain thing appear right to one people, and wrong to another; but afterwards was conceived in the sense of the law's sovereignty over all things divine and human.

Thus, in the *Digest* it is stated that the philosopher Chrysippus began his book entitled περὶ νόμου (a treatise on law) in this manner: "Law is the king of all things, both divine and human; it ought to control, rule, and command both the good and the bad, and hence be a standard as to things just and unjust, and a director of beings political by nature, enjoining what ought to be done and forbidding what ought not to be done."²

Natural or moral law may sometimes be found to conflict with positive law. When Creon accused Antigone of breaking the laws of the State, she replied that those laws were not ordained by Zeus, or by Justice who dwells with the gods below:

Conflict of
moral law with
positive law.

"CR. Now, tell me thou—not in many words, but briefly—knewest thou that an edict had forbidden this?

AN. I knew it; could I help it? It was public.

CR. And thou didst indeed dare to transgress that law?

AN. Yes; for it was not Zeus that had published me that edict; not such are the laws set among men by the Justice who dwells with the gods below; nor deemed I that thy decrees were of such force, that a mortal could override the unwritten and unfailing statutes of heaven. For their life is not of to-day or yesterday, but from all time, and no man knows when they were first put forth."³

¹ iii. 38.

² Cf. *Dig.* i. 3 (De legibus senatusque consultis et longa consuetudine), 2: ὁ νόμος πάντων ἐστὶ βασιλεὺς θείων τε καὶ ἀνθρωπίνων πραγμάτων· δεῖ δὲ αὐτὸν προστάτην τε εἶναι τῶν καλῶν καὶ τῶν αἰσχροῶν καὶ ἄρχοντα καὶ ἡγεμόνα, καὶ κατὰ τοῦτο κανόνα τε εἶναι δικαίων καὶ ἀδίκων καὶ τῶν φύσει πολιτικῶν ζῶων, προστακτικὸν μὲν ὧν ποιητέον, ἀπαγορευτικὸν δὲ ὧν οὐ ποιητέον.

³ *Soph. Antig.* 450 seq.:

KR. σὺ δ' εἰπέ μοι μὴ μῆκος, ἀλλὰ συντόμως,
ἤδησθα κηρυχθέντα μὴ πράσσειν τάδε;

AN. ἤδη· τί δ' οὐκ ἔμελλον; ἐμφανῇ γὰρ ἦν.

KR. καὶ δῆτ' ἐτόλμας τοῖσδ' ὑπερβαίνειν νόμους;

Different interpretations have been given of the action and significance of the play. Thus Böckh held that both Creon and Antigone transcended the limits of their respective obligations, the one by an infraction of the natural or divine law, the other by disobedience of the conventional law ; and both are ultimately punished for defending principles, intrinsically sound, in a mistaken manner. A similar opinion is that of Hegel, to the effect that in the view of the Eternal Justice, both were wrong because they were one-sided, but at the same time both were right.¹ The sympathies of Sophocles, however, are wholly with Antigone ; and he undoubtedly intends to convey that she was in the right.²

Moral law and
divine law

Sophocles elsewhere describes the moral laws as the offspring of the gods. "May destiny still find me winning the praise of reverent purity in all words and deeds sanctioned by those laws of range sublime, called into life throughout the high clear heaven, whose father is Olympus alone ; their parent was of no race of mortal men, no, nor shall oblivion ever lay them to sleep ; a mighty god is in them, and he grows not old."³

AN. οὐ γὰρ τί μοι Ζεὺς ἦν κηρύξας τάδε,
οὐδ' ἡ ξύνοικος τῶν κάτω θεῶν Δίκη
τοιούσδ' ἐν ἀνθρώποισιν ὤρισεν νόμους·
οὐδὲ σθάνειν τοσούτον φόβῳ τὰ σὰ
κηρύγμαθ', ὥστ' ἀγραπτα κἀσφαλῇ θεῶν
νόμῳ δύνασθαι θνητὸν ὄνθ' ὑπερδραμεῖν·
οὐ γάρ τι νῦν γε κἀχθές ἀλλ' αἰεί ποτε
ξῆ ταῦτα, κούδεις οἶδεν ἐξ ὅτου φάνη.

¹ *Religionsphilosophie*, ii. 114.

² See the Introduction, p. xxii, and notes, *passim*, in Jebb's edition and translation of the *Antigone*.

³ *Oedip. Tyr.* 863 seq. :

XO. εἰ μοι ξυνείη φέροντι
μοῖρα τὰν εὐσεπτον ἀγνείαν λόγων
ἔργων τε πάντων, ὧν νόμοι πρόκεινται
ὑψίποδες, οὐρανίαν
δι' αἰθέρα τεκνωθέντες, ὧν Ὀλυμπος
πατὴρ μόνος, οὐδέ νιν
θαντὰ φύσις ἀνέρων
ἔτικτεν, οὐδέ μάν ποτε λάθα κατακοιμάσει
μέγας ἐν τούτοις θεός, οὐδέ γηράσκει.

This idea is of frequent recurrence in Greek literature, a conspicuous instance being Plato's *Apologia*. In Homer and elsewhere the duty of vouchsafing hospitality to suppliants is regarded as being directly enjoined by Zeus.¹

The expression 'natural law' is liable to misinterpretation. Briefly it may be said that 'natural' is to be understood in the sense of 'rational.' Law is reason unaffected by desire,² as Aristotle emphasizes—*διόπερ ἄνευ ὁρέξεως νοῦς ὁ νόμος ἐστίν*. The term 'natural law' often misinterpreted.

One often speaks of an individual's 'nature' in the sense of his desires, his peculiarities,—which may, indeed, defeat or obscure his real fundamental nature. Thus positive law is essential as a corrective. "The whole life of men, O Athenians, whether they inhabit a great city or a small one, is governed both by nature and by laws. Of these, nature is something irregular, unequal, and peculiar to the individual; laws are regular, common, and the same for all. Nature, if it be depraved, has often vicious desires; therefore you will find people of that sort falling into error. Laws desire what is just and honourable and useful; this they aim at, and when it is attained, it is set forth as a general ordinance, the same and alike for all. And that is law, which all men ought to obey for many reasons, and especially because every law is an invention and gift of the gods, a resolution of wise men, a corrective of errors, intentional and unintentional, a compact of the whole State, according to which all who belong to the State ought to live."³ Relation of positive law to natural law.

A certain application of these conceptions and distinctions is seen in the sphere of the Greek law of nations. We find writers frequently referring to "the laws of" Expressions for general or common law.

¹ Cf. the article by J. Bryce on the Law of Nature, in his *Studies in History and Jurisprudence*, Oxford, 1901, vol. ii. pp. 112 *seq.*

² *Polit.* iii. 16. 5.

³ [Demosth.] *c. Aristogiton*, i. 16: . . . δόγμα δ' ἀνθρώπων φρονίμων, ἐπ' ἀνόρθωμα δὲ τῶν ἑκουσίων καὶ ἀκουσίων ἀμαρτημάτων, πόλεως δὲ συνθήκη κοινή, καθ' ἣν πᾶσι προσήκει ζῆν τοῖς ἐν τῇ πόλει.

Hellenes," "the common laws of Hellas," "the laws of mankind," "the laws common to men," etc. Hence expressions such as the following are constantly used : τὰ τῶν Ἑλλήνων νόμιμα ;¹ τὰ πάντων ἀνθρώπων νόμιμα ;² τὰ κοινὰ τῶν Ἑλλήνων νόμιμα ; κοινοὶ νόμοι ; κοινὰ δίκαια τῆς Ἑλλάδος ; τὰ κοινὰ τῶν ἀνθρώπων ἔθη (καὶ νόμιμα) ;³ οἱ κοινοὶ τῶν ἀνθρώπων νόμοι ;⁴ τὰ κατὰ κοινὸν ὠρισμένα δίκαια παρ' ἀνθρώποις ;⁵ τὰ πρὸς τοὺς ἀνθρώπους δίκαια (καὶ τὰ πρὸς τοὺς θεοὺς ὅσια) ;⁶ νόμιμα πάσης (συγγέοντας) Ἑλλάδος ;⁷ and the like.

Presence of many elements does not necessarily imply a perfect system.

Though a large number of important rules and practices of international law are implied in these expressions, one must not expect to find, as Schoemann points out, an entire system of clearly formulated legal dispositions. "Darunter sind aber keine bestimmt formulirte und ausdrücklich verabredete Satzungen zu verstehn—denn dergleichen gab es nur einige wenige zwischen verschiedenen Staaten."⁸

Unwritten law—in the law of nations.

The underlying principles belong mainly to the class of unwritten laws—νόμοι ἄγραφοι—deriving their force and juridical validity from the regular insistence of tradition and inveterate custom, and having for their sanction the will of the gods. "Sie gehören sämtlich zur Classe der ungeschriebenen Gesetze (νόμοι ἄγραφοι) die als Sitte und Herkommen gelten, und zu deren Beobachtung man sich durch eine sittliche Scheu oder durch religiöse Verehrung der Götter verpflichtet fühlt, von denen sie herrühren und den Menschen ins Herz geschrieben sind."⁹

¹ Thuc. iv. 97 ; Diod. Sic. xix. 63.

² Thuc. i. 3 ; i. 118 ; Plut. *Pericl.* 17 ; etc.

³ Polyb. i. 70. 6 ; iv. 67. 4. ⁴ *Ibid.* ii. 58. ⁵ *Ibid.* iv. 6, 11.

⁶ *Ibid.* xxii. 13. 8 ; ii. 8. 12. ⁷ Eurip. *Suppl.* 311.

⁸ G. F. Schoemann, *Griechische Alterthümer*, 2 vols., 4th ed. by J. H. Lipsius (Berlin, 1897-1902), vol. ii. p. 2.

⁹ *Ibid.*—On the force and significance of the unwritten law generally in antiquity, and especially in Greece, see R. Hirzel, "Ἀγραφος νόμος, in *Abhandlungen der philologisch-historischen Classe der königlich sächsischen Gesellschaft der Wissenschaften*, Bd. xx. No. 1 (Leipzig, 1900), pp. 23 seq.

Further, a certain distinction was drawn between the "laws of the Hellenes," and the "laws of all men," based on the broader distinction between Greeks and barbarians. The νόμιμα τῶν Ἑλλήνων, consisting partly of natural or of customary law, and partly of conventional law, based on express compacts, were applicable primarily to the members of the Hellenic circle, but were sometimes also adopted, as a special concession or as a recognition of a broader reciprocity, in relationships with non-Hellenic communities. The νόμιμα τῶν ἀνθρώπων, consisting almost exclusively of traditional usages and principles spontaneously enforced by human conscience, were thought fit to be applied to men as men, and irrespective of race or nationality.

Distinction between the "laws of the Hellenes" and the "laws of all men."

Now the difference between these two classes was not necessarily a difference of kind, as a good many writers seem to imagine, but a difference of extent, a difference—to borrow a term from logic—of denotation. The greater portion of the latter class was also contained in the former; but there were many rules in the former class which were but rarely extended to the latter. There was never, at all events, a hard-and-fast line of demarcation between the two. There is manifested, no doubt, in several Greek writers, particularly in Euripides,¹ a certain antagonism between Hellenism and 'barbarism.' But such contrast, involving an opposition to and disparagement of non-Hellenic peoples, arises mainly from sentiments of civic and national pride, from a perception of the intellectual and artistic pre-eminence of the Greeks, from a conviction of a special bestowal of favours on them by the gods. Besides, the expressions, particularly so the more general one—νόμιμα τῶν ἀνθρώπων,—are frequently employed with varying contents; for example, the νόμιμα τῶν ἀνθρώπων are sometimes mentioned in the sense of universal law, and as a criterion of the moral validity of any law, apart from being used in reference

¹ E.g. in his *Medea*, 536 seq., 133 seq.; *Hecuba*, 1199 seq.; *Heracleid.* 130 seq.; *Iphig. in Tauris*, 1399 seq.; *Androm.* 173 seq.

to relationships with the barbarians. Thus, the slaughter of the Persian envoys by the Athenians and Spartans was confessedly a transgression of the νόμιμα τῶν ἀνθρώπων, as a law of the human race generally, and not merely as a law applicable exclusively to the barbarians. And Xerxes recognized and submitted to such general law, when he answered, on suggestions being made to him that he should resort to similar retaliation, that he would not be like the Lacedaemonians, for they had violated the law of all nations by murdering his heralds, and that he would not do the very thing which he blamed in them.¹

Ancient
elements of
international
law.

That the ancients possessed a complete system of international law no one can justifiably assert. That they possessed important elements thereof which contributed greatly to subsequent juridical evolution is undeniable. Practice was not invariably consistent, and was not always in accordance with recognized principles. But is this the case even now in our more enlightened times? To deny the existence of ancient international law *in toto*, simply because a perfectly organized system did not obtain, is, to say the least, a gross injustice to the ancients. International law is based on the recognition of the principles of juridical equality and reciprocity of nations; and, in respect of the interstate relationships and practices, these principles were, as the later chapters will amply show, in a large measure recognized and applied, in spite of the assertion by this or that race of its intellectual superiority, or by this or that State of its civic and constitutional pre-eminence. To lay claim to intellectual, material, or other predominance does not of necessity eliminate entirely equality before the law.

Difference
between the
ancient and
the modern
conceptions.

Of course the principles of equality, reciprocity, and subservience to the law were not then as explicit and

¹ Herodot. vii. 136: . . . οὐκ ἔφη ὁμοίως ἔσεσθαι Λακεδαιμονίοισι· κείνους μὲν γὰρ συγχέαι τὰ πάντων ἀνθρώπων νόμιμα, ἀποκτείναντας κήρυκας· αὐτὸς δέ, τὰ κείνοισι ἐπιπλήσσει, ταῦτα οὐ ποιήσειν. . . .

as firmly established as they are now. To admit this is not to imply the admission that international law then was a non-entity, but simply to concede that it had not the breadth, the completeness, the firm basis, the scientific co-ordination of the modern law. Naturally the ancients had not yet arrived at the modern conception which, as Fusinato remarks, presupposes the voluntary recognition of law on the part of organized States in free co-existence, equal and autonomous,¹—and, it may be added, such unreserved recognition of law being related to the insistence on a strictly positive sanction. Various writers urge that the law of nations is, on the one hand, inconsistent with the notion of a “chosen race,” based on the grounds either of religion or of culture, and, on the other, with the notion of universal dominion; and, further, that its rational development is impossible where a stranger is regarded as an enemy, or an infidel, or a barbarian. To this effect writes a modern German author: “Das Völkerrecht ist unverträglich mit dem Gedanken eines, sei es durch einem besonderen Bund mit der Gottheit, sei es durch eine überlegene und eigenartige Kultur ‘auserwählten Volkes.’ So lange im Sinne des jüdischen wie des klassischen Altertums der Staatsfremde als Feind, als Ungläubiger oder als Barbar galt, konnte ein Völkerrecht sich nicht entwickeln. Das Völkerrecht ist aber auch unverträglich mit dem Gedanken einer Weltherrschaft. . . .”² The answer to this contention has already been suggested in general terms. It has already been pointed out that the absence of a complete

Notion of
superiority or
of ‘chosen
race’ in the
law of nations.

¹ G. Fusinato, *Dei feziali e del diritto feziale* (in *Atti della Reale Accademia dei Lincei*, 1883-4. Serie Terza. *Memorie della Classe di scienze morali, storiche e filologiche*, vol. xiii.), p. 455: “Certamente i Romani, come tutti gli altri popoli dell’ antichità, non ebbero nè potevano possedere un diritto delle genti secondo il concetto moderno, il quale presuppone il volontario riconoscimento del diritto da parte degli Stati organizzati in libera coesistenza uguale ed autonoma.”

² F. von Liszt, *Das Völkerrecht systematisch dargestellt* (Berlin, 1906), p. 15.

and scientifically systematized body of law does not, in itself, render juridically inapplicable the elements that do exist; and that the denial of equality was based on a speculative theory, which was more of the nature of a phantasm than of an effective guide to practice. More specific answers will be given in the succeeding chapters which will present such a comprehensive body of material as will suffice, it is hoped, to disprove traditional and oft-repeated, indiscriminating opinions.

"Inter-municipal law" and international law.

Again, it has been said with regard to Greece that her international law was more of the character of an inter-municipal law,¹ on the ground of the admitted natural bonds between the Hellenic States, based on the community of origin, customs, language, religion,—as Herodotus says: τὸ Ἑλληνικὸν εἶναι ὁμαῖόν τε καὶ ὁμόγλωσσον καὶ θεῶν ἱδρυματὰ τε κοινὰ καὶ θυσίαι ἡθεαί τε ὁμότροπα.² But the Greek municipalities being autonomous and equal before the law, they present an adequate correspondence to the modern civilized States, constituting the family of nations; and their 'intermunicipal law' offers a sufficiently valid counterpart to modern international law. The Roman *ius gentium* and *lex naturae* furnished a more secular basis for the law of nations, but the religious element in the Greek law cannot *per se* invalidate its juridical significance and application. Further, when it is contended³ that the Hellenic law of nations was rather 'universal' than 'international,' the answer immediately follows that the greater part of international law, even of the most ideal code as constructed by modern theorizers, either is substantially such 'universal' law, or is based on it; the contrary is, indeed, inconceivable. Neither universality nor particularity (nor, in truth, anything else) obliterates or even diminishes the international character of rules and practices when, in point of fact, such rules are regu-

'Universal' law and international law.

¹ Cf. T. A. Walker, *History of the Law of Nations* (Cambridge, 1899), p. 38.

² viii. 144.

³ Walker, *op. cit.* p. 43.

larly insisted on and such practices regularly applied between independent and sovereign nations.

Apart from the pride of race and the hostile attitude to foreigners (which have been so much misrepresented by modern writers who have made their own exaggerated estimate testify to the very impossibility of ancient international law), ineradicable patriotism and ceaseless rivalry of the Greeks prevented to a large extent the more rapid and complete development of the law of nations. The necessary condition of political equilibrium was absent for the most part. The Corinthians' reproach that Athens would neither remain at rest herself nor allow tranquillity to others was equally applicable to other peoples among the more powerful city-states, and especially so when in the ascendant. Confederacies were often established for the protection of common interests, sometimes even for self-preservation, the most powerful member assuming of its own accord, or being conceded by the remaining members, the hegemony which invariably tended to develop into sovereignty. Hence a continual conflict between the necessity of alliances and the spirit of independence. Athens and Sparta were the arch-rivals. To obtain supremacy they constantly fomented discords, and so the balance of power in Hellas was ever in a state of oscillation.

Patriotism and rivalry in the development of ancient law.

Political equilibrium rare.

The fundamental cause militating against the preservation of political equilibrium was the existence of so many States, and of such small States, in comparative proximity to each other ; and, as a consequence of this, the fact that the citizens of the respective States were the soldiers, and the soldiers were the citizens,—the same individuals fighting in the wars and voting in the assemblies.

Main causes of this.

However, Greek international law, such as it was, shows a decided advance on antecedent law both in theory and in practice. The main matters it comprised are as follows : various questions of private international law, naturalization, position of aliens and especially

In any case, Greek law of nations an advance on previous law.

Main subject-matter

of metoecs (domiciled aliens), *proxenia* (analogous to the modern consular system); questions of public international law in time of peace, such as hospitality, right of asylum, extradition, position of ambassadors, and character of diplomatic negotiations, treaties and alliances, colonies, balance of power and right of intervention, international arbitration; in time of war, questions relating to sufficient cause of war, declaration, truce and armistice, ransom of prisoners, spies, hostages, reprisals and *androlepsia*, a certain neutralization, and various mitigations of warfare, including regulations as to burial of the dead, treatment of temples and graves, and those who took refuge in temples, as also priests, erection of trophies, neutrality; some maritime provisions concerning the treatment of the shipwrecked, *nautodikai* and jurisdiction of the admiralty court, embargo, blockade, piracy, etc.

Preservation
of records
of ancient
practices.

Inscriptions.

The records of the practices relating to the above matters, as well as to those of Roman international law, are to some extent preserved in inscriptions on bronze or marble tablets, of which a large number of texts are extant,¹ and partly in the works of contemporary historical and other writers. Though a great many documentary records have been lost, as, for example, that of the famous peace of Antalcidas concluded with Persia in 387 B.C., the science of epigraphy has been a veritable revelation of ancient international law, and an invaluable supplement to and corrective of the historical writings. On the other hand, many of the documents which are preserved regulate the differences only of obscure and unimportant cities; nevertheless they throw light on the negotiations that probably took place between the more considerable States. Further, various public and interstatal transactions are inferred from the legends on medals and coins.² A more fugitive index, as Egger

¹ Some useful collections, as well as the great *Corpus inscriptionum Graecarum*, are given in the bibliography.

² Cf. A. de Barthélemy, *Manuel de numismatique ancienne* (Paris, 1851), *passim*; and, more particularly in the case of Rome, T. Mommsen, *Geschichte des römischen Münzwesens* (Berlin, 1860), *passim*.

points out,¹ is found in the reported names of galleys, e.g. *Εἰρήνη* (peace); *Εἰρήνη καινή* (new or recent peace); *Εἰρήνη τῶν αἰχμαλώτων* (relating to prisoners of war, or booty);² *Ὁμόνοια* (harmony, or unity);³ *Συμμαχία* (alliance),⁴ etc.

As to the historical and other writers we have the testimony of Herodotus, Thucydides, Demosthenes, Xenophon, Polybius, Diodorus Siculus, Dionysius, Plutarch, Livy, Cicero, Aulus Gellius, certain texts in Gaius and the *Digest*, and many others.⁵ Of the principles and practices more especially relating to the second century before the Christian era, Polybius is an invaluable authority. He is, on the one hand, far more reliable than writers like Livy in respect of the narration of facts and events, and, on the other, is more profound and has a much greater historical grasp and a more accurate notion of the historical method. He indicates the outlines of a "family of nations," comprising the Great Powers of Rome, Carthage, Macedonia, Syria and Egypt, and Parthia and Bactria; States of secondary rank like the commonwealths of Hellas, the kingdoms of Asia Minor, Pergamos, Bithynia, Cappadocia, Pontus, and Paphlagonia; and finally, semi-barbarous principalities in Illyria and Numidia. The contribution of Polybius has not incorrectly been described as presenting a structure of a philosophic law of nations—"Gebäude des philosophischen Völkerrechts."⁶ He not only acted as a historical reporter of events and rules, but examined the significance and applicability of the same,

Historical
writings.

¹ *Op. cit.*, in the Introduction.

² A. Boeckh, *Seewesen der Athener* (Berlin, 1840-51), p. 86.

³ *Ibid.* p. 90.

⁴ *Ibid.* p. 92.

⁵ See bibliography as to the ancient writers consulted.

⁶ R. von Scala, *Die Studien des Polybios* (Stuttgart, 1890), vol. i. p. 323: "Auf dem Grunde peripatetischer Gelehrsamkeit aufgebaut, fester gegründet durch die an der Bekanntschaft mit Rom gewonnenen Gesichtspunkte, das noch ganz anders als die orientalischen Völker eine Kulturmacht darstellt, erhebt sich das polybianische Gebäude des philosophischen Völkerrechts."

and made critical suggestions in favour of such an international policy as would have redounded to the greater harmony and honour of the States concerned.

No ancient
works on
international
law.

Of Greek or Roman works dealing specially with international law we have scarcely a trace. Demetrius Phalereus (c. 345 B.C.-283 B.C.) is said to have written a treatise, and Varro (166 B.C.-27 B.C.) is reported by Aulus Gellius¹ (and also cited by him on the question of truces) to have written a contribution on war and peace (*De bello et pace*) as a part of his principal work, *Antiquitates rerum humanarum et divinarum*. We have, of course, in the *Institutes* of Gaius, and in the *Digest* and *Codex* of Justinian certain scattered texts appertaining to the law of nations as recognized in the Roman civil law.

Grotius'
mistake.

By a curious inadvertence, Grotius says that Aristotle wrote a treatise on the laws of war: "Veterum philosophorum nihil exstat huius generis neque Graecorum, quos inter Aristoteles librum fecerat cui nomen Δικαιώματα πολέμων..."²; and, although the error was pointed out by Barbeyrac, in his edition of Grotius' work, Sir James Mackintosh repeated it in his *Discourse on the study of the law of nature and of nations*, originally delivered as lectures at Lincoln's Inn, 1799. The mistake is explained by a phrase of Ammonius the Alexandrian grammarian (fl. c. 400 A.D.), and by the substitution of the word πόλεων for πολέμων in the title of one of Aristotle's works—Δικαιώματα τῶν πόλεων (the "laws of States," not, as Grotius had read, the "laws of war"), of which some fragments have reached us.

¹ *Noct. Att.* i. 25.

² *De jure belli et pacis*, Proleg. § 36.

CHAPTER III

THE JURISTIC GENIUS OF ROME.—*IUS NATURALE* *IUS GENTIUM*, AND KINDRED CONCEPTIONS

AMONGST the ancient nations, the Romans possessed the greatest juristic and political genius. The Greeks theorized, experimented, made tentative provisions; the Romans observed the issues clearly, and adopted measures according to the immediate needs of time and place. The Greeks were visionaries in comparison with the Romans, who were of a positive and calculating spirit, and prudent men of affairs. The Greek was carried away by, and was almost a slave to, his imagination¹; the Roman was guided by, and was master of, a sound, practical, hard-headed common-sense. Hence the supreme philosophy and poetry and art of the Greeks, and their preference for territorial exclusiveness: hence the supreme juristic work of the Romans, and their unsatiable longing for territorial expansion and conquest of the material world.² The Greek jealousy

Difference
between the
Greek and
the Roman
genius.

¹ Cf. Laurent, *op. cit.* vol. iii. p. 3: "La Grèce représente les facultés brillantes de l'imagination, pour elle la vie est un banquet auquel elle assiste, couronnée de fleurs et chantant des hymnes à la joie."

² Cf. Bluntschli's statement in which he sums up in what respects lay the superiority of the Romans over their predecessors and teachers: "Aber in zwei Beziehungen übertrafen die Römer ihre älteren Vorbilder und Lehrer, fürs erste durch ihre *juristische* Begabung und insbesondere ihre grössere Fähigkeit, scharfe und klare Rechtsformen auszubilden, fürs zweite durch ihren *grossartigeren politischen Geist* und eine Staatspraxis, die entschlossen war, sich der Welt zu bemächtigen" (J. C. Bluntschli, *Das Beuterecht im Krieg und das Seebeuterecht insbesondere*, Nördlingen, 1878).

of citizenship is contrasted with the Roman policy of incorporation, realized gradually and surely by the extension of the franchise first to Italy, then to Gaul and Spain, and ultimately to the entire Roman empire. The great skill of the Romans in the sphere of practical jurisprudence was manifested alike in the assemblies of the people, in the legislative *comitia*, in the institution of the tribunes, and in that of the praetor. To meet all possible emergencies, elasticity in the law was aimed at; to supplement or modify generally or supply the deficiencies of the statutory provisions, a system of legal fictions and rules of equity was devised and constantly applied. The Romans were the first people in the world clearly and firmly to grasp the fact that law is a living organism.

Influence of
religion on
Roman law.

As with the law of the Hellenes and that of all other nations of antiquity, the influence of religion on the law of Rome was likewise great, notably during the first half of her history. The Roman ritual was somewhat simpler than the Greek, which, presenting certain heterogeneous elements of oriental origin, was thereby rendered less stable, both in respect of its form and of its significance. The sacred formula was the governing element and the indispensable condition in the adjustments of all kinds of legal relationships, whether they possessed a municipal or an international character. Rome was apparently dominated by an absolute formalism in all things, divine and human; in reality, however, this formalism was made to subserve the underlying purpose and all-important substance of this or that transaction. The basis of all relationships, of all obligations was conceived to be sincerity and good faith; and Rome always prided herself on her invincible attachment to *bona fides*, and constantly held up to scorn, in contrast to her own laudable attitude, the infidelity, the dissimulation, the duplicity of foreign nations. 'Punica fides,' 'graeca fides,' and the like, became proverbial expressions of reproach. *Bona fides* was closely allied to religiousness, piety, respect for the

The principle
of *bona fides*.

gods. Though for many centuries Rome was inspired with the "fear of God," to use Machiavelli's expression—"per più secoli non fu mai tanto timore di Dio quanto in quella repubblica,"¹—nevertheless her international law contains a large body of rules which are not directly drawn from religion, but issue from her international juridical consciousness.

Just as the νόμιμα Ἑλλήνων are closely allied to the νόμιμα ἀνθρώπων, so has the Roman *ius civile* many points of contact, in reference to its origin and essential nature, with the *ius gentium*. The *ius civile*,
and the *ius*
gentium.

The expression *ius civile* has been used in various senses. At the beginning of the *Institutes* of Justinian, we find *ius civile* defined as those laws which are enacted by a State for its own subjects, and are peculiar to itself.² It is, again, used as synonymous with *ius privatum*.³ *Ius privatum.* Then it is employed in contradistinction to the *ius honorarium*, the law introduced by the edicts of the magistrates; ⁴ for example, where the institution as heir of a stranger's posthumous child would, according to the civil law, be invalid, he could nevertheless be put in possession of the property by the praetorian law (though this praetorian provision was later embodied in the civil law).⁵ *Ius honorarium.* Further, *ius civile* is sometimes used to signify that portion of the law which is the work of the jurisconsults.⁶ Further
meaning of
ius civile.

¹ *Discorsi sopra la prima deca di Tito Livio*, lib. i. cap. 11 (della Religione de' Romani), *in init.*

² i. 2. 1: "Nam quod quisque populus ipse sibi ius constituit, id ipsius civitatis proprium est, vocaturque ius civile."

³ Just. *Inst.* i. 2. 10.

⁴ *Dig.* i. 1 (de justitia et jure), 7: "Ius autem civile est, quod ex legibus, plebis scitis, senatus consultis, decretis principum, auctoritate prudentium venit."

⁵ "Nam si alienus postumus heres fuerit institutus, quamvis hereditatem iure civili adire non poterat, cum institutio non valebat, honorario tamen iure bonorum possessor efficiebatur, videlicet cum a praetore adiuvabatur; sed hic e nostra constitutione hodie recte heres instituitur, quasi et iure civili non incognitus" (*Inst.* iii. 9).

⁶ *Dig.* i. 2 (de origine juris et omnium magistratuum et successionem prudentium), 2. 5: "His legibus latis coepit (ut naturaliter evenire

Division of
law into public,
private, and
sacred.

Jurisconsults, historians, and other writers, including poets, frequently emphasize a tripartite division of law into public, private, and sacred ; thus, in Ausonius we find :

“Ius triplex, tabulae quod ter sanxere quaternae ;
Sacrum, privatum, et populi commune quod usquam est.”¹

And Cicero points out the relationship between the civil law and the law of nations, in so far as their content is concerned, and insists that whatever distinction may have been made between them the civil law ought always to comprise the law of nations, though the law of nations obviously cannot be co-extensive with the civil law.² Indeed, the Romans never did really recognize the existence of any marked difference in the fundamental principles of private law, public law, and international law, either as regards their cogent applicability, or as regards the force of their respective sanctions.

The *ius gentium*—its
origin and
meaning.
Maine's view.

There is a great difference of opinion as to the origin of the *ius gentium* and as to its meaning.³ According to Sir Henry Maine, the *ius gentium* represents the totality of common elements found in the customs and usages

solet, ut interpretatio desideraret prudentium auctoritatem) necessariam esse disputationem fori. haec disputatio et hoc ius, quod sine scripto venit compositum a prudentibus, propria parte aliqua non appellatur, ut ceterae partes iuris suis nominibus designantur, datis propriis nominibus ceteris partibus, sed communi nomine appellatur ius civile.”

Cf. *Dig. i. 2* (de orig., etc.), 2. 12 : “Ita in civitate nostra aut iure, id est lege, constituitur, aut est proprium ius civile, quod sine scripto in sola prudentium interpretatione consistit. . . .”

¹ *Opuscula*, ed. R. Peiper (Lipsiae, 1886), *Edyll.* xi. (336), p. 203, ll. 61-62.

² *De offic.* iii. 17 : “Itaque maiores aliud ius gentium, aliud ius civile voluerunt ; quod civile, non idem continuo gentium ; quod autem gentium, idem civile esse debet.”

³ As to the different meanings attributed to the phrase *ius gentium*, see the article by H. Nettleship, in *The Journal of Philology*, vol. xiii. (1885), pp. 169-181 ; reprinted in his *Contributions to Lexicography* (Oxford, 1889), pp. 500-510. Cf. also J. Baron, *Peregrinenrecht und Jus Gentium* (Leipzig, 1892), *passim*.

of the ancient Italian tribes, which constituted *all the nations* that the Romans had opportunities of coming in contact with and observing. "Whenever a particular usage was seen to be practised by a large number of separate races in common, it was set down as part of the law common to all nations, or *ius gentium*. . . . The *ius gentium* was accordingly a collection of rules and principles, determined by observation to be common to the institutions which prevailed among the various Italian tribes."¹ The *ius gentium*, the same writer goes on to say, was a system of which the Roman was compelled to take cognizance in consequence of political exigencies. "He loved it as little as he loved the foreigners from whose institutions it was derived, and for whose benefit it was intended. A complete revolution in his ideas was required before it could challenge his respect, but so complete was it when it did occur, that the true reason why our modern estimate of the *ius gentium* differs from that which has just been described, is that both modern jurisprudence and modern philosophy have inherited the matured views of the later jurisconsults on this subject. There did come a time when, from an ignoble appendage to the *ius civile*, the *ius gentium* came to be considered a great though as yet imperfectly developed model to which all law ought as far as possible to conform."²

In a subsequent work,³ Maine incidentally points out that originally the *ius gentium* was also to some extent a kind of market law, owing its existence to the necessity of commercial relationships. In this respect it would bear a certain resemblance to our own law-merchant.

The view of Savigny inclines to the conception of the close relationship between the *ius gentium* and a private international law. As more and more aliens

View of
Savigny.

¹ *Ancient Law*, ed. Sir F. Pollock (London, 1906), pp. 52 *seq.*

² *Ibid.*

³ *Village Communities in the East and West*, pp. 193-4 (published in 1871, the *Ancient Law* having been first issued in 1861).

were admitted, and as Rome extended her dominion, and assimilated conquered peoples, it became necessary to apply other or modified provisions in the case of aliens residing temporarily or more permanently on Roman territory, so as to meet the interests and demands of justice. The rules thus admitted gradually formed the body of *ius gentium*. They were based on the principle of personality, that is, on considerations of the nature and applicability of the personal law of the stranger; in other words, the *origo* of the individual, not his *domicilium*, was usually adopted as the determining factor in the solution of legal difficulties.¹ Thus the *ius gentium*, which was instituted in favour of non-citizens, served as a supplement to the *ius civile*, the ancient national law, which was reserved for citizens exclusively.²

Of Karlowa.

Karlowa³ agrees with Savigny as to origin, but denies the application of the principle of personality, namely, the *ius originis*.

Of Puchta.

A somewhat different explanation is advanced by Puchta.⁴ He begins with a consideration of the *ius fetiale*, as embodying the rules and principles governing the relationships which arise out of the declaration of war and the conclusion of peace, and prescribing the necessary formalities thereof. He assumes that in the ancient treaties—matters within the scope of the fetial law—as, for example, in the earlier treaties between Rome and Carthage, there must have been clauses regulating the various relationships arising from the intercourse of the subjects of the allied States. Then

¹ As to *origo* and *domicilium* and their respective applications in regard to conflicts of laws, see *infra*. (See contents table and index.)

² F. C. von Savigny, *System des heutigen römischen Rechts*, 9 Bde. (Berlin, 1840-1851), Bd. i. lib. i. c. iii. s. 22; and *Geschichte des römischen Rechts im Mittelalter*, 7 Bde. (Heidelberg, 1834-1851), Bd. i. c. i. s. 1.

³ O. Karlowa, *Römische Rechtsgeschichte*, 2 Bde. (Leipzig, 1885-1901); cf. Bd. i. § 59.

⁴ G. F. Puchta, *Cursus der Institutionen*, 2 Bde. (Leipzig, 1875), Bd. i. § 83, pp. 304 *seq.*; and cf. Nettleship, *loc. cit.*

he refers to the institution of the *recuperatores* and that of the *praetor inter peregrinos*, whose jurisdictions respectively were determined to meet the new and constantly growing needs. Thus a general Roman peregrin-law—"ein allgemeines römisches Peregrinenrecht"—was the result. The claims of peregrins, who were necessarily debarred from availing themselves of the *ius civile*, were settled, as Savigny held, by the adoption of the peregrins' national law, or, where this was not possible, by resorting to principles which were more or less universally recognized;—(provided, it may be safely added, that in both cases the adoption of such measures was not in any way prejudicial to the Roman commonwealth). Hence the *ius gentium* was the law applied to the *gentes*,—to the various nations besides the Roman. "Das römische *ius gentium* ist das Recht welches Rom den Gentes, also den Völkern ausser dem römischen, in ihren Gliedern, die vor den römischen Behörden Recht suchen, gewährt."¹ And the expression indicates law determined not merely in view of any individual nation, but for foreign peoples in general. "Zugleich liegt in dem Wort, dass es ein allgemeines, nicht bloss für ein einzelnes Volk bestimmter Recht ist."² Puchta's conclusion is that the *ius gentium* presents two aspects which may be designated the objective and the subjective (though, strangely enough, he does not here make use of these expressions so beloved of German writers). In the first place it represents the 'general peregrin law' applied to individuals to whom the civil law was not extended, and consisting substantially of the peregrins' own laws, adapted to render them universally applicable, and modified and enlarged under the influence of Roman conceptions. Secondly, it represents the law not deliberately arrived at by scientific

¹ Puchta, *loc. cit.* It is to be noted in this connection, however, that the word *gentes*, when used in the sense of foreign nations, in contradistinction to the Romans, is of very rare occurrence, and post-Augustan.

² *Ibid.*

analysis and speculation, but as issuing spontaneously and imperceptibly from the progressive spirit of the Romans, from their broadening juridical sense. "Das *ius gentium* hat zwei Seiten: einmal ist es das allgemeine Peregrinenrecht, nach welchem die Römer die Rechtsverhältnisse von Personen beurtheilten, für die das *jus civile* keine Anwendung fand; die Grundlage dieses Rechtes, waren wirkliche Peregrinenrechte, nur nach dem Bedürfniss allgemeiner Anwendbarkeit und unter dem Einfluss römischer Auffassung mannigfaltig modificirt und erweitert. Dann aber ist es das Recht, welches in den erweiterten allgemeinen Rechtsansichten des römischen Volks seinen Ursprung hat, das also nicht auf eine künstliche Art, durch Speculation oder gelehrte Forschung, gemacht, sondern durch die innere Macht des in seiner Bildung fortschreitenden Volksgeistes hervorgetrieben ist."¹

View of Jörs.

Jörs² follows Puchta, and insists that the *ius gentium* consists of peregrin rules which have gradually passed into the Roman civil law, until at last the entire substance of the *Weltrecht* became the law of Roman citizens,—“bis schliesslich die ganze Masse des Weltrechts ein recht der Römischen Bürger geworden ist.”³

Of Wlassak.

The same opinion is held by Wlassak,⁴ who sees in international relationships the source of the *ius gentium*,⁵ which, with certain exceptions, became embodied in the Roman civil law.⁶

Of Mommsen.

Mommsen,⁷ again, regards the *ius gentium* as private international law,⁸ gradually developed in Rome by the side of the municipal law.

Of Rudorff.

Its international character is also emphasized by

¹ Puchta, *loc. cit.*

² P. Jörs, *Römische Rechtswissenschaft zur Zeit der Republik* (Berlin, 1888), pp. 134, 139, 151, Anm. 1.

³ *Ibid.* p. 147. ⁴ *Römische Prozessgesetze* (Leipzig, 1888-91), 2 Pt.

⁵ *Ibid.* ii. p. 145.

⁶ *Ibid.* p. 131, Anm. 15.

⁷ Cf. *Römisches Staatsrecht* (Leipzig, 1887-88), Bd. iii. pp. 603-6.

⁸ For fuller treatment of this question, see *infra*.

Rudorff,¹ who even goes so far as to maintain that it represents, on the one hand, public international law as regulating the relationships between States *qua* States, and, as such, is a veritable *ius belli et pacis*, and, on the other hand, private international law as adjusting the differences between individual members of the various States. "Zwischen und über diesen nationalen Rechten steht das internationale Ius Gentium. Es enthält die gemeinsamen Grundlagen des Verkehrs, nach welchen zu entscheiden ist, wo das eigene oder fremde Civilrecht nicht massgebend sein kann. Als gemeines Recht der Staaten seines Rechtskreises beherrscht es die Rechtsverhältnisse (1) der Staaten gegen einander, das *Jus belli et pacis*, (2) der einzelnen Glieder verschiedener Staaten, also das internationale Privatrecht, z. B. das Recht der Wechselheirathen und obligatorischen Verträge, soweit sie wie das *mutuum* (μοῦτον), die *emptio*, *locatio*, u.s.w. international sind, den Schutz des Besitzes und des Rechtsfriedens."²

Dirksen³ had already advanced an opinion to this effect before Rudorff, and, more recently, Willems⁴ held the same point of view.

Voigt,⁵ who, as Baron says,⁶ likes to go his own way—"der doch seine eigenen Wege zu gehen liebt"—asserts that with the introduction of a silver currency, and the adoption of a more fixed coinage system, demanded by the necessities of international commercial relationships, the *ius gentium* was gradually called into being for the purpose of determining the rights and obligations arising in transactions between citizens and peregrins, or

¹ A. F. Rudorff, *Römische Rechtsgeschichte*, 2 Bde. (Leipzig, 1857).

² *Ibid.* vol. i. p. 3.

³ H. E. Dirksen, *Über die Eigenthümlichkeit des Jus Gentium nach den Vorstellungen der Römer* (in *Vermischte Schriften*, vol. i. pp. 200-252, Berlin, 1841); cf. esp. pp. 215 seq.

⁴ P. Willems, *Le droit public romain* (Louvain, 1883), p. 128, note 5.

⁵ M. Voigt, *Römische Rechtsgeschichte*, 3 Bde. (Leipzig, 1892-1902).

⁶ *Op. cit.* p. 38.

between peregrins themselves; and the growth of this body of rules was facilitated on the one side by the borrowings of the *praetor urbanus* from the *edictum peregrinum*, and on the other by those of the *praetor peregrinus* from the *ius civile*. “. . . Gleichwie man in dem neu eingeführten Silbergelde und Sextantarassee eine Münze schuf, die dem internationalen Geschäftsverkehr zu dienen berufen war, so ward auch das *ius gentium* als Rechtsordnung für den Verkehr mit oder zwischen Peregrinen, nicht dagegen zwischen Cives ins Leben gerufen, vielmehr geschah es erst im Laufe weiterer Entwicklung, dass ein dem *edictum urbanum* und *peregrinum* gemeinsamer Stock von Satzungen sich bildete, sei es dass der *praetor urbanus* aus dem *edictum peregrinum* oder der *praetor peregrinus* aus dem *ius civile* entlehnte.”¹ The same writer, in another work,² says that the *ius gentium* in its earlier stages was an independent international private law which, as such, regulated the various relationships between peregrins, or between citizens and peregrins, on the basis of their common *libertas*. “Nach Alledem aber haben wir im Sinne des Alterthumes die Wesenbestimmung des *ius gentium* für die früheste Periode seines Bestehens dahin zu geben, ein selbstständiges, internationales Privatrecht zu sein, welches als solches den Verkehr zwischen Peregrinen unter sich, wie mit *cives romani* auf Grund der den verkehrenden beiwohnenden *libertas* normirte.”³ During the Republic this *libertas* was merely of an empirical nature, and practically free from the influence of scientific or philosophical speculation, which, however, with the jurists of the early Empire, co-operating with their construction of a comparative jurisprudence brought about an extension of such *libertas*.⁴

¹ *Römische Rechtsgeschichte*, vol. i. p. 154.

² *Das ius naturale aequum et bonum und ius gentium der Römer*, 4 Bde. (Leipzig, 1856-1876).

³ *Ibid.* vol. ii. p. 661.

⁴ Voigt, *ibid.* vol. i. pp. 399, 400.

Now the difficulty in determining the origin of the *ius gentium* is greatly enhanced by the fact that Roman writers use this expression in different ways.¹ Sometimes it is used in a popular sense, much in the same way as we would say "public opinion," or the "sense of nations," etc. As derivatives from such usage we find the adverbial phrases *ubi gentium* (where in the world), *minime gentium*, *nusquam gentium*. It is, again, employed in a somewhat quasi-legal sense, with reference to common customs or usages of the world. Then its legal significance emerges when it is recognized that in the relationships between peoples such usages, when applicable, will be spontaneously adopted or expected on the ground of their universal, or seemingly universal, acceptance by "tacit consent,"—a presumption or fiction introduced in the earliest times to impart a juridical character to transactions based on such common usages; so that, in this connection, *ius gentium* is now used to signify a public international law, now a private international law.

Difficult to fix precisely the origin of *ius gentium*. The expression used in a large variety of ways.

The juriconsults frequently make use of the expression in reference to certain simple cases of contract, of ownership, of actions;² for example, questions as to the position and treatment of ambassadors (also very often mentioned by the historians);³ questions as to transactions between individuals, of which Gaius and the *Digest* give many examples relating to the *obligationes* of *traditio*, *acceptilatio*, etc., and the implied *actiones*; questions as to the ownership of certain things and places, of which the *Digest* makes frequent reference to the sea, the shore, alluvial deposit, booty taken in war, etc.

Use of the term by juriconsults.

In a passage already quoted,⁴ which is a passage of

¹ Cf. Nettleship, *loc. cit.*

² *Ibid.* p. 175.

³ Sallust, *Iug.* xxxv. 6; Livy, i. 14. 1; ii. 4. 7; viii. 5. 2; xxi. 10. 6; Tacit. *Ann.* i. 42 (all quoted by Nettleship). Cf. *infra*, the chapter on ambassadors.

⁴ "Itaque maiores aliud *ius gentium*, aliud *ius civile* voluerunt; quod civile non idem continuo *gentium*; quod autem *gentium*, idem civile esse debet" (*De offic.* iii. 17).

Cicero's
reference to
the distinction
between *ius
gentium* and
ius civile.

Validity of
such reference.

great importance owing to certain inferences drawn therefrom by modern writers, Cicero stated that his ancestors drew a distinction between the *ius gentium* and the *ius civile* to the effect that the former was universal unwritten law, the latter special or particular written law. The statement of Gaius¹ corresponds substantially with Cicero's. Now with regard to this passage, Nettleship asserts that the ancestors (*maiores*) Cicero speaks of probably refer to the theoretical lawyers of the second century before the Christian era. But, it may well be asked, why limit the origin of this distinction to that date? It was then, perhaps, that such distinction was more explicitly formulated,—a proceeding which was, indeed, inevitable at a time when a large variety of matters in jurisprudence were elucidated and subjected to thorough analysis. There can be no doubt that through the influence of Greek writers, if through no other cause (which is a highly improbable hypothesis), and particularly through the Aristotelian distinction² between νόμος ἴδιος (the particular law), and the νόμος κοινός (the universal, the unwritten law, ἄγραφος), the Romans, earlier than the second century B.C., discriminated clearly between the *ius gentium* and the *ius civile*, although, of course, that distinction was never a hard-and-fast one.

Ius gentium
and *ius
naturale*,
ius naturae.

Again, *ius gentium* is frequently taken by the jurists as synonymous with *ius naturale*,³ *ius naturae*, though there are also many cases where they are

¹ *Inst.* i. 1; cf. *Just. Inst.* i. 2, 1.

² Cf. *supra*, p. 53.

³ On *ius naturale* generally, see B. W. Leist, *Gräco-Italische Rechtsgeschichte* (Jena, 1884), § 32, pp. 199 *seq.*; the same author's *Civ. Stud.* i. (1854), p. 33; iii. (1859), pp. 3 *seq.*; *Naturalis ratio und Natur der Sache* (1860); *Civ. Stud.* iv. (1877) pp. 1 *seq.*; Voigt, *Das jus naturale* . . . vol. i. pp. 244 *seq.*; K. Hildenbrand, *Geschichte und System der Rechts- und Staatsphilosophie*, Bd. i. *Das Klassische Alterthum* (Leipzig, 1860), pp. 566 *seq.*; G. Brini, *Ius naturale* (Bologna, 1889); Sir F. Pollock, *History of the law of nature* (in *Journal of the Society of Comparative Legislation* (London, 1900) pp. 418-433).

distinguished from each other. In the *Nicomachean Ethics*,¹ political justice is divided by Aristotle into natural, τὸ μὲν φυσικόν, and conventional, τὸ δὲ νομικόν. The rules of natural justice are those which are necessarily recognized by all civilized men, as civilized men, irrespective of place or nationality; whilst the rules of conventional justice are those which are deliberately and expressly enacted by sovereign authority for the particular individuals subject thereto, and serving to confirm, to explain, or to complete the former.² Aristotle's conception of nature implies the notion of rational design, or "reason," in the universe; and of this "reason" manifestations are perceptible in the physical or material world, though its perfect realization is there never attainable.

This theory was developed more fully by the subsequent schools of Greek philosophers, particularly so by the Stoics. The latter "emphasized the teleological and ethical aspects of the peripatetic doctrine, and fixed on the term 'nature' in this connection the special meaning of the constitution of man as a rational and social being."³ It is noteworthy that also among the ancient Aryans the word *rita* expressed the design, principle, or order which governed the universe,—the alternations of day and night, the various manifestations of nature, birth, growth, decay.⁴ No doubt to this corresponds the conceptions of *ritus*, *ratio*, *ratum* of the Latins, as also the notion of *rerum natura*, and, in a certain sense, *ius naturale*.

Influence
of the Greek
philosophy.

Now the substance of the Roman *ius gentium*, when actually applied in practice, was seen to harmonize, for

Substance of
ius gentium
and notion
of natural
justice.

¹ v. 10 (quoted *supra*, p. 54).

² As Bossuet says (in *Sermon sur la justice*): "La créature raisonnable a ses lois dont les unes sont naturelles; et les autres, que nous appelons positives, sont faites ou pour confirmer, ou pour expliquer ou pour perfectionner les lumières de la nature."

³ Sir F. Pollock, *ibid.* p. 419.

⁴ Cf. Leist, *Gräco-Italische Rechtsgeschichte*, p. 187; and see, *passim*, the same writer's *Alt-Arisches Jus Gentium* (Jena, 1889).

*Naturalis
ratio.*

the most part, with the precepts of this natural justice ; so that what was first seen to be a close kinship between them gradually developed into a notion of identity. Hence the juriconsults regarded the *ius gentium* as equivalent to *ius naturale*, the Latin expression for the Greek *φυσικὸν δίκαιον*. Thus Gaius refers to the rules prescribed by 'natural reason' for all, and observed by all nations alike, "... quod vero naturalis ratio inter omnes homines constituit, id apud omnes populos peraeque custoditur vocaturque ius gentium, quasi quo iure omnes gentes utuntur."¹ This *naturalis ratio* was conceived to be the self-evident principle of the universe, and essentially unchangeable and immutable, representing perfect justice, and inspiring into human minds a moral faculty. Cicero gives various examples of the guidance and efficacy of the universal reason,—*natura*, or *naturae ratio*. It is laid down, he says, not only by the law of nature, that is the law of nations, but also by the statutory law of States, that no one shall be allowed, for his own advantage, to inflict an injury on another. Now he who obeys the behests of universal reason, which is the law of gods and men alike,—in other words, he who lives according to nature—will never covet his neighbour's goods, or be induced to appropriate for his own profit what he has wrested from another.² Cicero, whilst insisting that true law must be derived from philosophy—"penitus ex intima philosophia hauriendam disciplinam putat"³—does not, nevertheless, overlook the fact that it is and must be made for man—"hominum causa omne ius constitutum

¹ *Inst.* i. 1.

² *De offic.* iii. 5. 23 : "Neque vero hoc solum natura, id est, iure gentium, sed etiam legibus populorum, quibus in singulis civitatibus res publica continetur, eodem modo constitutum est, ut non liceat sui commodi causa nocere alteri . . . naturae ratio, quae est lex divina et humana ; cui parere qui velit—omnes autem parebunt, qui secundum naturam volent vivere—numquam committet ut alienum appetat et id, quod alteri detraxerit, sibi adsumat." Cf. also *ibid.* iii. 17. 69.

³ *De leg.*

est."¹ The Romans with their practical spirit, and their general incapacity—if not unwillingness or indifference—to follow the metaphysical disquisitions and subtle analysis of the Greeks, constantly emphasize that necessity begets law, and that law is always subject to the exigencies of some particular time and place.²

Occasionally we find that the *ius gentium*, in the sense of universal usage, is considered to be in conflict with natural equity—*aequum bonumque*. For example, Sallust referring to the case of Bomilcar says that the accusation against him when he reached Rome was made rather on considerations of equity than in accordance with the usage of nations (*ius gentium*)—"fit reus magis ex aequo bonoque quam ex iure gentium Bomilcar, comes eius qui Romam fide publica venerat";³ that is, in this case, equity—*aequum bonumque*—was made to override the claims of *fides publica*,⁴ which appertained to the *ius gentium*.

Ius gentium sometimes in conflict with natural equity.

During the maturity of the Roman jurisprudence, that is, during the Empire until the days of Diocletian, the *ius naturale* exercised a great influence. Its characteristics, as expressed by Voigt, were, from a speculative point of view, a potential general validity or universal applicability—for all individuals, for all nations, for all times—in consequence of which it claimed to be free from abrogation by the civil law. Hence the *ius naturale* is potentially a *ius gentium*, in the sense of a *ius commune omnium hominum*; and, further, as the *ius naturale* necessarily implies *aequitas*, it is of the nature of *aequum et bonum*, as differentiated from the *ius civile*, which repre-

Influence of the *ius naturale*.

Ius commune omnium hominum.

¹ *De finibus*, iii. 20; cf. Gaius and Hermogenes in *Dig.* i. 5. 2.

² Cf. Publilius Syrus (fl. c. 45 B.C.), *Sententiae*:

"Honeste lex est temporis necessitas.
Necessitas dat legem, non ipsa accipit."

³ *Jug.* xxxv. 6.

⁴ On the conception of *fides* and its force in the law of nations, see *infra*. (Consult the index for various references thereto.)

Ius strictum.

sents the *ius strictum*.¹ From a practical point of view the contemporary juriconsults, by considering the actual application of the *ius naturale* to everyday life, make it clear that certain conclusions were inferred by them,—an admission of the claims of the principle of kinship (“*sanguinis vel cognationis ratio*”); a necessary obligation of fidelity to engagements (“*is natura debet . . . cuius fidem secuti sumus*,” as Paulus says in the *Digest*); the apportionment of advantages and disadvantages, gain and loss, in accordance with the demands of *aequitas*, with the standard of the *bonum et aequum*; and, generally, a predominance of the spirit, the intention—“*ratio voluntatis*,”—over the letter or outward form.²

Possible conflicts between the *ius naturale* and the *ius civile*.

The *ius respondendi* of the juriconsults.

It would appear that serious difficulties would be created in the possible antagonism between the newer dispensations of the *ius naturale* and the previously existing provisions of the *ius civile*. But such inconsistencies, as derogatory to the civil law, were largely avoided by the fact that the juriconsults of the early Empire possessed the *ius respondendi* which virtually constituted them legislative organs of the State. Thus, the new principles of the *ius naturale* or of *aequum bonumque* introduced by them were endowed, *ipso facto*, with the force of law. These jurists were, as Voigt

¹ Voigt, *Das ius naturale . . .*, vol. i. p. 304: “Die potentielle Gemeingültigkeit des jus naturale für alle Menschen, bei allen Völkern und zu allen Zeiten bedingt, dass dem jus naturale der Anspruch zukömmt, durch das jus civile nicht aufgehoben zu werden ;

Die potentielle Gemeingültigkeit des jus naturale für alle Menschen und bei allen Nationen resultirt, dass das jus naturale in potentia ein jus gentium, d. h. ebensowohl ein jus commune omnium hominum, wie ein jus ist, quo omnes gentes utuntur, während anderseits der rein nationale Character des aus der civilis ratio hervorgegangenen jus civile bedingt, dass dasselbe seinem Wesen nach auch ein jus civile im Gegensatze zum jus gentium ist ;

Die Uebereinstimmung des jus naturale mit den Anforderungen der aequitas bedingt, dass das Erste ein bonum et aequum ist, wogegen das jus civile als das strictum jus sich darstellt.”

² Voigt, *ibid.* pp. 321-3.

says,¹ "philosophers in the region of law, investigators of the ultimate and highest truth ; but whereas they, for the most part in reference to a concrete case, sought out the truth and applied what they had found, they combined with the freedom of speculation the vitality and freshness of practice, and the power of assuring the applicability of their abstract propositions."

It is, in fact, the *naturalis ratio*, observes Voigt, that is the point of departure of the philosophical systems of law of Gaius and Paul,—". . . mit diesem Begriffe beginnen für uns die rechtsphilosophischen Systeme des Gaius und Paulus."² This *naturalis ratio* is that which represents the total and essential significance of each thing, "its ordinative energy and determinative rule." The *lex naturae* is the product of such *naturales rationes* ; and the substance of the *lex naturae* constitutes a *ius naturale*.³

It is here worthy of note that Ulpian in a passage, adopted both in the *Digest* and in Justinian's *Institutes*, defines *ius naturale* as the law which is common to man and all animals,—"*quod natura omnia animalia docuit*,"—and distinguishes it from *ius gentium*, which is the rule applicable to men alone—"*solis hominibus inter se commune*." Of this definition Sir Frederick Pollock says we are not obliged to believe "that it was current among Roman lawyers in Ulpian's own time, or anything but a conceit borrowed from some forgotten Greek rhetorician."⁴ But, it is submitted, it is not necessary to refer to a supposed lost Greek source this particular definition of Ulpian. And it is scarcely to be designated a "conceit," unless it be necessarily a conceit to adopt a modified sense, or rather to emphasize some

Function of
the *naturalis*
ratio.

Lex naturae.

Ulpian's
special
application of
ius naturale.

Submitted
explanation.

¹ *Ibid.* vol. i. p. 341: "... Sie sind Philosophen auf dem Gebiete des Rechtes, Erforscher letzter und höchster Wahrheit, allein indem sie, meist im Hinblick auf den concreten Fall, das Wahre erforschen und das Erkannte verwirklichen, verbinden sie mit der Freiheit und Ungebundenheit der Speculation die Lebensfrische der Praxis und die Macht dem abstracten Satze die Verwirklichung zu sichern."

² *Ibid.* vol. i. p. 274.

³ Cf. Voigt, *ibid.* vol. i. pp. 270-274.

⁴ Note (E) to Maine's *Ancient Law*, pp. 75-6.

particular element of the denotation of a term which had ever been used by writers with marked elasticity, and the definition of which had never been finally fixed or universally agreed upon. To lay stress on some particular aspect of a term is not necessarily to employ that term in a far-fetched sense, foreign to the underlying meaning. When Ulpian in his definition lays stress on natural instinct, he simply uses the expression *ius naturale* to denote what Cicero had intended to convey by *vis naturae*, and Seneca by *lex naturae*. Thus Cicero, speaking of the reproduction and nurture of the lower animals, makes use of these words: "atque etiam in bestiis vis naturae inspicere potest; quarum in foetu, in educatione laborem quum cernimus, naturae ipsius vocem videmur audire."¹ Seneca uses *lex natura* in reference to the physical sensations of hunger, thirst, cold: "Lex naturae non esurire, non sitire, non algere."² Then followed Ulpian with: "Hinc descendit maris atque feminae conjunctio . . . hinc liberorum procreatio, hinc educatio; videmus enim caetera quoque animalia, feras etiam istius iuris perita censerem."³ Here we see that, as Cicero and Seneca had done before him, Ulpian (probably not unmindful of other notions then current) singled out natural instinct as a fundamental factor, providing for the propagation and preservation of the species. Justinus, writing still later than these, uses *naturae ius* to express the right of the eldest son to the succession,⁴ though elsewhere he adopts *ius gentium* in reference to the same right.⁵

¹ *De finibus*, iii. 19.

² *Epist.* iv.

³ *Dig.* i. 1. 1.

⁴ "Exstincto in Sicilia Dionysio tyranno in locum eius milites maximum natu ex filiis eius, nomine Dionysium, suffecere, et naturae ius secuti, et quod firmitus futurum esse regnum, si penes unum remansisset, quam si portionibus inter plures filios divideretur, arbitrabantur" (xxi. 1. 2).

⁵ For further illustrations of the elastic character of the word *natura*, compare the following verses from Virgil:

"Hos natura modos primum dedit . . ." (*Georg.* ii. 20).

" . . . Has leges aeternae foedera certis

Imposuit natura locis . . ." (*Georg.* i. 60-61).

In modern times, with all the ripeness of our language and our vaunted habits of scientific precision, we do not always use words strictly and in the same sense, regardless of context. Nor did the ancients always do so. The scientific tendency to refine conceptions, to label them, to materialize them, as it were, is always accompanied by the poetic tendency to widen them, to apply them to somewhat different circumstances.

Use of terminology in the modern world.

The words *ius*, *lex*, etc., have been already used a good deal; in this connection, therefore, it will be worth while to say something of their meanings, and of their implications both in private and in public law.

The word *ius* is in the older Latin *jous*, signifying justice and law. *Ius* mainly represents justice in its human aspect. Some of its derivatives are *iustus*, *iudex*, *iurgo*, *iniuria*, *iuro*, in the last of which a religious connection is obvious. *Ius* has been derived by some etymologists from *iubeo* ("quod iussum est a populo"). But this is, as Bréal says,¹ to explain the antecedent by the consequent, in view of the fact that *iubeo* is a compound of *ius* and *habeo*. The word *jaus* is found as a neuter substantive both in ancient Sanscrit and in Zend. In the Vedas, *jus* is used with a religious meaning, such as 'salvation,' or 'divine protection';² and in the Avesta the compound *jaos-dā* means 'to purify.' In such words as *iudex*, *iudicare*, *iudicium* we get *ius* associated with *dico*, which is found in *dicio* (as, for example, in the phrase "in dicione populi Romani"), and *condicio*. The Latin *dico*, it is usually held, corresponds to the Greek *δείκνυμι*, whence we get *δίκη*, and its various derivatives.³ It is, however, not improbable that the substantive *δίκη* is related to the verb *δύκειν*, just as *τύχη* is akin to *τυχεῖν*, *πάθη* to *παθεῖν*, and so on with various other similar words. In this case *δίκη* might not unreasonably

Significance of the word *ius*.

¹ M. Bréal, *Sur l'origine des mots désignant le droit et la loi en latin* (in *Nouvelle Revue historique de droit français et étranger*, Paris, vol. vii. (1883), pp. 603-612).

² *Ibid.* p. 606.

³ *Ibid.* p. 612.

be thought to imply the idea of the stroke of the rod of justice, in reference to the judge's decision in the disputes of litigants by a vertical stroke of his rod (*ἰθεῖα δίκη*)¹.

Meaning
of *lex*.

Lex is, of course, clearly connected with *legere*. Its origin is, however, a matter of dispute. As Bréal says:² "Lex est la Lecture, comme chez les peuples sémitiques la loi c'est l'Écriture." Greek words corresponding to *lex* are *θεσμός*, *ρήτρα*, *νόμος*.³ The ordinances of Lycurgus were called *ρήτραι*⁴ (in the sense of unwritten laws). At Athens, Solon's laws were generally described as *νόμοι*,⁵ Draco's as *θεσμοί*⁶ (connected with *θέμις*).

Lex and
νόμος.

Use of *lex*
by the Roman
jurisconsults.

The Roman jurisconsults employed the word *lex* in two senses: in the first place, as meaning an enactment of the *comitia*,⁷ and hence sometimes *lex publica*;⁸ and secondly, as meaning a declaration, condition, or restriction, expressly incorporated in a private deed (*lex privata*), as in the phrases, *lex mancipii*, *lex contractus*, *lex testamenti*, etc.⁹ Later, *lex* acquired further meanings, as, for example, an imperial constitution.¹⁰

¹ Cf. R. Hirzel, *Themis, Dike, und Verwandtes.—Ein Beitrag zur Geschichte der Rechtsidee bei den Griechen* (Leipzig, 1907), pp. 94 seq.

² *Ibid.* p. 610.

³ The underlying sense of this word is thus expressed by Aristotle: 'Ο νόμος τάξις τίς ἐστὶ καὶ τὴν εὐνομίαν ἀναγκαῖον εὐταξίαν εἶναι (cf. *Polit.* iv. 8. 6). *Nómos* is evidently related to *νέμεσις*.

⁴ Tyrtaeus, ii. 8; Plut. *Lycurg.* 13.

⁵ Andocid. *De Mysteriis*, 82; Aelian. viii. 10.

⁶ Because each began with the word *θεσμός*; and hence the revisers of the law were termed *θεσμοθέται*.

⁷ Gaius, i. 3. ⁸ *Ibid.* ii. 104; iii. 174. Cf. Aul. Gell. x. 20. 2.

⁹ Cf. J. Muirhead, *Historical Introduction to the private law of Rome* (London, 1899); note by the editor, Prof. Goudy, pp. 18 seq. See also Voigt, *Röm. Rechtsgeschichte*, i. p. 21; Mommsen, *Röm. Staatsrecht*, iii. pp. 308-10.

¹⁰ Cf. W. Soltau, *Gültigkeit der Plebiscite* (Berlin, 1884). Cf. further as to *ius* and *lex*, the lines of Ausonius, *Opuscula*, ed. Peiper (Lipsiae, 1886), *Edyll.* xii. (339), p. 157, ll. 12-13:

"Lex naturali quam condidit imperio ius,
Ius genitum pietate hominum, ius certa Dei mens."

On *ius*, *lex*, *dike*, *themis*, etc., see E. C. Clark, *Practical Jurisprudence*

Fas corresponds to the Greek *θέμῖς*, hence *fastus* to *Fas* and *θέμῖστος*, and *nefas* to *οὐ θέμῖς*; so that the Latin 'fas est' is equivalent to the Greek *θέμῖς ἐστὶ* ("it is meet and right").¹ *Fas* refers rather to rules of an exclusively religious character; for example, in relation to the auspices, to the art of augury, and to the various ceremonies of worship. Similarly, *fastus*, the derivative of *fas* (as *iustus* is derived from *ius*) pertains to pontifical laws.

Both *fas* and *θέμῖς* are frequently personified in beginning solemn invocations to the gods.² Festus points out that Themis was considered a goddess instructing men as to what was *fas*: "Them̃in deam putabant esse, quae praeciperet hominibus quid fas esset, eamque id esse existimabant, quod et fas est."³ Personification of *fas* and *θέμῖς*.

Leist states that to the fundamental conception of *rita*⁴ (the Latin *ratio*) of the ancient Aryans other notions are related, which are thus expressed: *vrata*, to which corresponds the *fas* and the *ratum* of the Latins; *dhāma*, analogous to the Greek *θέμῖς*; *svadhā*, answering to *ἔθος* or *ἥθος* of the Greeks, and to *mos* of the Latins; whilst *dharma* approaches the meaning of *lex*.⁵ It may be said briefly that *ratio* signifies the fundamental principle of the universe governing the course of things Ratio—the fundamental conception.

(Cambridge, 1883), pp. 16-58; and especially Hirzel, *op. cit.*—For the relationships between *ius*, *fas*, and *lex* in Roman jurisprudence, cf. L. Mitteis, *Römisches Privatrecht* . . . (Leipzig, 1908), vol. i. pp. 22-37.

¹ *Iliad*, xi. 779; xiv. 386; *Odys.* x. 73; xiv. 56; etc.

² Cf. Seneca: "Fas omne mundi" (*Hercul. Fur.* 658); and the invocation of the fetials (Livy, i. 32). See *infra* on fetials.

³ *s.v. Themis*, in C. E. G. Bruns, *Fontes juris Romani antiqui*, ed. T. Mommsen (Freiburg, 1887), p. 372. The same conception is found in Ausonius, *Edyll.* xii. (343), p. 161, ll. 44-45.

"... prima deum Fas
Quae Themis est Graiis . . ."

Cf. Voigt, *Die XII. Tafeln* (1883), vol. i. p. 102.

⁴ See *supra*, p. 79.

⁵ *Gräco-Ital. Rechtsgeschichte*, p. 187; cf. also the same author's *Alt-Arisches Jus Gentium* (*passim*).

divine and human, whilst *ius*, *fas*, and *mos* are the various aspects of this operating force.¹

Fas and *ius*—
contrast.

Non-legal writers very often contrast *fas* and *ius*.² Both, indeed, represent the will of the gods;—in *fas* it is declared by inspired agency, for example, by augurs, oracles, etc.; in *ius*, by ordinary human agency. The *ius* was the product of traditional and inveterate custom, or of statute (*lex*), or of both. *Fas* sometimes permitted certain things expressly prohibited by *ius*, thus: “transire per alienum *fas* est, *ius* non est.”³ In the sphere of relationships between nations, *fas* forbade war if it was not prosecuted in accordance with the due formalities of fetial procedure,⁴ it insisted on *bona fides*, e.g. in promises made even to the enemy, it protected hospitality to strangers;⁵ and in civil relationships, it forbade murder, the sale of a wife by her husband, filial impiety, etc.⁶ A violation of *fas* rendered the offender *impius*; the sin was sometimes expiable, and sometimes no expiation could apply. Where expiation was possible, a peace offering (*piacularis hostia*) had to be made to the injured city, and, on some occasions, additional satisfaction had to be made to any third party involved.

Fas and
bona fides.

Boni
mores, and
ēthos.

Boni mores, regulating public and private morality and general order, is taken to be different from the *ius moribus constitutum*; but part of its content was also within the spheres of *ius* and *fas*. Its function was somewhat similar to that of modern ‘public opinion,’ especially in respect of mitigating the extreme exercise of legal right, where this would appear to be inequitable, and of enforcing the observance of such moral obligations (*officia*) as were beyond the limits of legal process, e.g. *obsequium et reverentia, pudicitia, fides*, etc. The Greek equivalent is practically *ēthos* or *ἦθος*. Festus, in his

¹ As to *fas* and *mos* in early Italy, see G. Carle, *Le origini del diritto romano* (Torino, 1888), pp. 98-104; origin of *ius*, pp. 104-116.

² E.g. Livy, vii. 31; Virg. *Aen.* ii. 157.

³ Isidore of Seville, *Origins*, v. 2. 2.—As to *fas* and *lex*, cf. the verse of Persius, *Sat.* 5: “Publica lex hominum, naturaque continet hoc *fas*.”

⁴ See *infra*.

⁵ See *infra*.

⁶ Cf. Muirhead. *op. cit.* pp. 15 *seq.*

definition of *mos*,¹ points out its religious character, and also defines *ritus* as "*mos comprobatus in administrandis sacrificiis.*"²

It is to be noted that the post-mediaeval writers on international law, so devoted to the Roman jurisprudence and so desirous of introducing by all means Roman notions into the consideration of contemporary questions, have a good deal to say as to the relationships between the *ius naturale* and the *ius gentium*; but their conclusions and discriminations are, as Professor Goudy observes, "vague and unsatisfactory."³ Isidore of Seville, writing in the early part of the seventh century, uses *ius gentium* to represent approximately the modern 'law of nations,' and puts under *ius naturale* what had before been termed *ius commune omnium nationum*. He gives a definite statement of the subject-matter of *ius gentium*: "*Ius gentium est sedium occupatio, aedificatio, munitio, bella, captivitates, servitutes, postliminia, foedera, paces, induciae, legatorum non violandorum religio, connubia inter alienigenas prohibita.*"⁴ The earlier Renaissance writers employed the expression *ius gentium* to imply something more than international law in the strict sense. Later, a distinction was frequently made between *ius naturale*, as indicating law whose necessity was manifest and unquestioned, and *ius gentium*, whose necessity was not obvious to the same extent. Writers like Suarez emphasized the force and significance of custom. Ayala held that *ius gentium* was added to the law of nations by general consent. Gentilis, again, laid stress on the principle of common consent, as related to natural reason. Grotius' use of *ius gentium* differs considerably from that of Roman

Post-mediaeval writers on *ius naturale* and *ius gentium*.

Isidore of Seville.

Suarez.

Ayala.

Gentilis.

Grotius.

¹ "*Mos est institutum patrum, id est memoria veterum pertinens maxime ad religiones caerimoniasque antiquorum.*" *s.v. mos* in Bruns, *Fuentes juris Romani antiqui*, *op. cit.* p. 343.

² *Ibid.*

³ Note to Muirhead, *op. cit.* p. 283.—Cf. also J. Westlake, *Chapters on International Law* (Cambridge, 1894), pp. 17 *seq.*

⁴ *Orig. lib. v. cc. 4-7.*

jurisprudence in that he excludes from it merely municipal ordinances, applying it only to interstatal institutions. The latter he considered to be sanctioned by the deliberate will of the family of nations as exercised within limits set by reason. Puffendorf appears to hold that they were practically identical. The Roman *ius gentium*, he says, is either part of the civil law or part of the *ius naturae*; and to this effect he also cites Hobbes. And so on with greater or lesser modifications by other writers.

Difficult to give strict definitions of the various expressions.

It was thought necessary to make the above observations for the purpose of showing conclusively that it is really impossible to lay down definitions marked by scientific precision and logical consistency, by comprehensiveness and exclusiveness alike, of such expressions as *ius gentium*, *ius naturale*, *ius naturae*, etc. Even the elemental conceptions of *ius*, *fas*, *mos*, *lex* (θέμις, ἥθος, δίκη, νόμος) are by no means distinct, clearly differentiated from each other, or mutually exclusive. Indeed, given two notions, there is bound to be something in common, no matter in what way they are contrasted. The crucial point is that sometimes their likeness is emphasized and considered predominating, by regarding mainly this or that attribute, at other times and under other conditions their difference is emphasized. Philosophical speculations and abstract analyses constantly intersected a system of rules derived from actual practice and custom; and the result of such action and reaction naturally tended to become more and more heterogeneous. It will be of advantage, notwithstanding these difficulties, to draw a rough or working distinction between the expressions *ius gentium* and *ius naturale*, as generally used by the Romans in reference to the law of nations.

In the ancient Italian institutions distinction between *ius gentilitium*, *ius gentilitatis*, and *ius gentium*.

In the institutions of the Italic tribes long before the Roman ascendancy we find, as an Italian writer¹ points out, that a distinction was made between the *ius*

¹ G. Carle, *op. cit.*

gentilicium, the *ius gentilitatis*, and the *ius gentium*. The *ius gentilicium*¹ governed the relationships between the superior class of *gentiles* and the dependent class of *gentilicii*; the *ius gentilitatis* comprised the body of laws regarding the members of the class of *gentiles*; and the *ius gentium* regulated the relationships between the various *gentes*.²

And so this *ius gentium*, as originally an intertribal law of limited application, gradually expanded through the growth of dealings with non-*gentes*, that is intercourse not only with the Italic peoples but also with the nations of Greece, Macedonia, Syria, Africa, etc. The rise of Rome's supremacy and the development of her civil law tended to reinforce the significance and applicability of this *ius gentium*. Her municipal law both added elements to it and borrowed principles from it. The praetorian institution rapidly accelerated its growth; indeed, the great bulk of the *ius honorarium* (*praetorium*, *aedilicium*) was absorbed by it.

The *ius honorarium* was by no means identical with the *ius gentium*, as some writers have carelessly imagined. The former included certain provisions which were not strictly recognized in the latter, e.g. the *actio Publiciana* (the legal remedy applied in the case of the transference of anything by a non-proprietor to an innocent transferee—bona fide possessor—should the latter have been deprived of its possession). Further, the *Digest* specifically opposes the 'praecepta civilia et praetoria' to the 'merum ius gentium.'³ Again, the *ius gentium* already contained a comparatively elaborate body of principles before the *ius honorarium* was even established.

¹ As to *ius gentilicium*, see Karlowa, *op. cit.* vol. i. p. 35; Muirhead, *op. cit.* p. 7; Willems, *Le droit public romain*, pp. 40, 69.

² Carle, *op. cit.* p. 45, note 3: "... Il *ius gentilicium*, che comprende anche i rapporti fra la classe superiore dei *gentiles* e quella dei dipendenti da essi o *gentilicii*, il *ius gentilitatis* che significa il complesso dei diritti spettanti ai membri di una stessa gente (*gentiles*), e i *jura gentium*, che governano i rapporti fra le varie *gentes*."

³ *Dig.* xvi. 3. 31.

Submitted explanation of the relation between the *ius gentium* and the *ius naturale*.

The human mind is not satisfied to remain in the concrete alone, and ever tends to get behind phenomena in order to discover their rationale; there is ever an instinctive conation to search for the corresponding *noumena*. And so we get speculative thinkers with their *ratio*, with their *natura*, with their *ius naturale*, and other kindred conceptions which, based, as they are deemed to be, on an apprehension of cosmic unity, of a harmony between human life and non-human, are necessarily to be the guiding principles of all human relationships, whether of a private or of an international character. The theoretical *ius naturale* and the practical *ius gentium* interact, refining and enlarging each other,—the former representing the ideal, what ought to be established, the latter representing the real, what is universally established. And as the two have a very large portion of their respective contents in common and converge towards the same goal, there is a tendency, especially in minds of what may be called a practical nature, to call one by the name of the other. Hence the jurisconsults, whilst using the two expressions as practically synonymous, generally speak of *ius naturale*, *ius naturae*, or *naturalis ratio*,¹ in order to emphasize the *raison d'être* of some particular rule; and, on the other hand, speak of *ius gentium* when they desire to point out its practical application. In reference to the process of juridical evolution as occasioned by the exigencies of increasing intercourse, one may say, with Sir F. Pollock,² “that *ius gentium* was presumed to follow *ius naturale*, if the contrary did not appear.”

Difficult to determine which came first in legal evolution.

Now to determine which of these two expressions was used first is of the utmost difficulty; indeed, it is well-nigh impossible. On this subject one writer has said one thing, another writer has said another thing; but, it must with all respect be said, no sufficient

¹ Cicero, as a rule, uses the expression *lex naturae* when he argues his subject from a philosophical point of view, as, for example, in *Tusc. Quaest.* i. 30; *De Inventione*, ii. 67 and 161; *De Leg.* (*passim*).

² *Op. cit.* p. 75.

ground or cogent reason has been advanced in any case. The counterpart to this question of terminology is the more important problem relating to the priority of the respective underlying conceptions. Can one say with an adequate degree of definiteness which of these conceptions—that of the more concrete *ius gentium* or that of the more abstract *ius naturale*—became crystallized first? To point to this or that as the earlier, as investigators for the most part have done, is, it is submitted, to commit that psychological fallacy (as it may be termed) which induces the unwary inquirer to infer from his own abstract detached point of view, consequent on an elaborate self-introspection coupled with *a priori* assumptions of a false logic, that certain notions which arise in his own mind and deemed to arise in a certain order, must necessarily have existed in the same form and evolved in the same order at a different epoch and in different minds. Further, and even from the point of view of a strictly formal logic, may we warrantably say that in the development of apperception the particular aspect (as being related more to the *ius gentium*) distinctly and of necessity precedes the general aspect (as being related more to the *ius naturale*)? It is again submitted, indeed, it is self-evident,—though, strangely enough, writers endeavouring to establish a priority have overlooked this fact,—that in the evolution of thought, legal or otherwise, the analytic and the synthetic processes necessarily accompany each other, and are as inseparable, if the comparison may be made, as the convex and concave sides of a curve. Of course, for certain purposes now this now that aspect is emphasized; the attention is directed to and concentrated on this or that process, or this or that conception. But if, in this way, the one is made explicit, the other does not thereby become a non-entity, but remains implicit; the one is in the focus of consciousness, the other is in the margin, and they are ever ready to exchange positions. And so, it is maintained, in

Fallacious
argument of
most writers.

The analytic
and the
synthetic
mental
processes
accompany
each other.

Simultaneous development of the notions contained in *ius gentium* and *ius naturale*.

opposition to the customary determination of priority, that the notions underlying *ius gentium* and *ius naturale* arose and were developed simultaneously,—and, moreover, were thus evolved not along independent parallel lines but in indissoluble association, by inevitable inter-sections and reciprocal implications.

Ius gentium—*ius fetiale* and *ius bellicum*.

The *ius gentium* represents both the private international law and the public international law of Rome.¹ No clear distinction appears to have been made between the two. Sometimes the expression *ius gentium* is also used in connection with *ius fetiale* or *ius bellicum*,—in some cases to point to a comparison, in others to point to a contrast.

Ius gentium and private international law.

The private international character of *ius gentium* was more accentuated in the earlier stages of its evolution. The extension of commercial relationships and the increasing influx of strangers necessitated the adoption of certain common rules and principles which dispensed with the need of inserting in treaties express stipulations as to *recuperatio*. The *ius civile Quiritium* was a personal law applicable exclusively to the *civis Romanus*; the *ius gentium* was a law applicable to all free men on Roman territory. Thus it was in this respect more of the nature of a territorial law, resulting partly from the national policy, and partly from a national juridical conscience. And though it was not as clearly defined and systematically set out as the modern private international law, it yet comprised a certain body of rules for avoiding or resolving conflicts that might arise between different systems of legislation.

Twofold character of *ius gentium*.

Rudorff emphasizes the twofold character of *ius gentium* as governing, on the one hand, the relationships between States themselves, the *ius belli et pacis*, and, on the other, the legal relationships between

¹ Cf. G. Baviera, *Il diritto internazionale dei Romani* (in *Archivio giuridico*, Modena, 1898; Nuova Serie, vol. i. and ii.), pp. 446 seq., the greater portion of chap. vii.

individual members of different States, *e.g.* the law of intermarriage and various contractual obligations, such as *mutuum* (loan for consumption), amongst unilateral conventions, *emptio* (purchase and sale), *locatio* (letting and hiring), amongst bilateral conventions, and several others, so far, of course, as these are of an interstatal nature. Their application, and the obligations clearly prescribed, thus tended to secure peace and the protection of property.¹

This *ius gentium*, as a code of private international law, cannot be strictly considered merely a national law, as writers such as Fusinato² have done. It was neither strictly national in its application, nor even purely Italian in origin. "A nation that borrowed its alphabet from a Chalcidian city, that imitated the military organisation of the Hellenes, that traded in the sixth century with Sicily, Sardinia, Libya and Carthage, must have been deeply imbued with the customs of the Greek and Phoenician world."³ Neither can it truly be said that such law was the necessary outcome of Rome's political supremacy; for many of the elements already existed before her supremacy for the purpose of regulating differences arising out of interstatal commercial dealings.

Ius gentium
as private
international
law.

With the territorial expansion of Rome and the

¹ A. F. Rudorff, *Römische Rechtsgeschichte*, 2 Bde. (Leipzig, 1857), vol. i. p. 3: "Zwischen und über diesen nationalen Rechten steht das internationale *jus gentium*. Es enthält die gemeinsamen Grundlagen des Verkehrs, nach welchen zu entscheiden ist; wo das eigene oder fremde Civilrecht nicht massgebend sein kann. Als gemeines Recht der Staaten seines Rechtskreises beherrscht es die Rechtsverhältnisse (1) der Staaten gegen einander, das *Jus belli et pacis*, (2) der einzelnen Glieder verschiedener Staaten, also das internationale Privatrecht, z. B. das Recht der Wechselheirathen und obligatorischen Verträge, soweit sie wie das *mutuum* (μῶτρον), die *emptio*, *locatio*, u.s.w. international sind, den Schutz des Besitzes und des Rechtsfriedens."

² G. Fusinato, *Le droit international de la république romaine* (in *Revue de droit international et de législation comparée*, Bruxelles, 1885, vol. xvii. pp. 278 seq.).

³ A. H. J. Greenidge, *Roman Public Life* (London, 1901), p. 294.

Roman
national policy
—and imperial
expansion.

gradual extension of her predominance, her legal attitude with regard to non-citizens was generally made to depend on political considerations, on State interest. Two principles, it may be said, dominated her national policy as to imperial expansion: firstly, to permit the inhabitants of submitted provinces to preserve their personal laws so far as the interests of administration necessitated no radical change; secondly, to concede to foreigners coming to settle in Rome all such rights and privileges as were in accord with the demands of equity and not prejudicial to national political interests. For centuries there were several intermediate gradations between full Roman citizenship and the purely private law of aliens; there was, for example, an important distinction between Latin rights, Italic rights, and provincial rights.

Roman
relationships
with foreign
nations.

The rules regulating Rome's relationships with foreign nations in their sovereign capacity are sometimes referred to under *ius fetiale*, sometimes *ius belli et pacis*, sometimes *ius gentium*. These rules did not, of course, constitute an international law in the modern sense of the term. The customs and usages were not always uniformly observed; and they scarcely acquired the objectivity and perfection of formal law. But modern international law is not always characterized by this quality. The Roman juriconsults recognized in the *ius fetiale*, and in the *ius civile Romanorum* a common philosophical basis, viz. the *naturalis ratio*. Thus, Gaius, speaking of the capture of enemy property which thereby becomes vested in the captor, says in the *Digest*:¹ "*Quae ex hostibus capiuntur, iure gentium statim capientium fiunt*," whilst in his *Institutes* the same rule is thus formulated: "... *Quae ex hostibus capiuntur naturali ratione nostra fiunt*."²

The *ius fetiale*,
and the *ius*
gentium.

The *ius fetiale*, however, is by no means identical with the *ius gentium*, though the latter served to a large extent as a guide in the development of the fetial institutions. The *ius fetiale* was a special system of principles and

¹ *Dig.* v. 41. 1. 7.

² ii. 69.

practices under the guardianship and jurisdiction of the college of fetials.¹ It prescribed the necessary formalities and proceedings relative to the declaration of war, to the conclusion of peace and of treaties, and to extradition for certain offences. In many points it coincided with the *ius gentium*, in the sense that the special is contained in the general, though certain matters of the *ius fetiale*—rather minor matters concerned with formal proceedings than fundamental questions relating to the veritable foundation of international law—were not found in the *ius gentium*, since they were provisions inculcated more by the Roman religion than by broad legal conceptions. Hence, an infraction of the *ius fetiale* constituted an offence against religion primarily, and sometimes against religion and the *ius gentium* equally. The *ius fetiale* was a formal recognition, with an added religious sanction, of customs and practices of war, and the other questions already suggested, of which the *ius gentium* took cognizance; so that it included, more or less, the *ius belli*² of the Roman jurists, the *ius bellicum* of Cicero,³ the *fas armorum* of Tacitus,⁴ the *assuetus belli mos*, of Silius Italicus.⁵ But it is to be observed, as Poste points out,⁶ that (in

¹ The view in the text differs somewhat from the opinion of Fusinato, *op. cit.*, and agrees in a sense with that of Chauveau, who holds that the *ius fetiale* is “la partie du droit des gens, du jus gentium, rentrant dans les attributions exclusives des fétiaux; quant au jus gentium, qui a pour équivalent jus belli ac pacis, c’est, dans son acception primitive, l’ensemble des règles applicables aux rapports entre les peuples et présentant un caractère juridique international.” (A. Chauveau, *Le droit des gens dans les rapports de Rome avec les peuples de l’antiquité*, in *Nouvelle Revue historique de droit français et étranger*, Paris, 1891, No. 4, pp. 393-445;—cf. p. 409, note.)

But, it must be pointed out, the *ius gentium* was not the equivalent of the *ius belli et pacis*, in the sense of their being co-extensive; the latter was subsumed under the former, which, therefore, as the wider category, included many matters foreign to the *ius belli et pacis*.—See, further, above text.

² Cf. also “Nil belli iura poposcit” (Lucan, vii.).

³ *De offic.* iii. 29.

⁴ *Hist.* iv. 58.

⁵ Born c. 25 A.D.

⁶ E. Poste, *Gaii Institutiones juris civilis* (Oxford, 1890), p. 358.

keeping with the already explained elastic use of the expression *ius gentium*) the word *ius* in the term *ius belli* sometimes designates not so much 'right' or 'law,' as sanction, or executive power, or means of compulsion; and Ovid in one place appears to employ the word in the sense of self-control, or inner force: "Nam desunt vires ad me mihi iusque regendi."¹

Ius bellicum
and *ius fetiale*.

Strictly speaking *ius bellicum*² is not synonymous with *ius fetiale*, as has generally been held; for it refers more particularly to the rights and obligations resulting from the actual state of war, and thus is, in many respects, allied to the *ius gentium*.

Ius legatorum.

Another portion of public international law, viz. that relating to the rights and duties of ambassadors, is often specifically described as the *ius legatorum*.³ This is part of the *ius gentium*, but it is also connected with the *ius fetiale*.

Ius fetiale and
ius gentium—
confused by
many modern
writers.

A good many writers seem to have confused also the *ius fetiale* with the *ius gentium*. Thus Zouche uses the expression *de iure feciali*⁴ as synonymous with *ius inter gentes*, that is, he makes it cover the whole sphere of international law.⁵ More recently Wheaton,⁶ Calvo,⁷ and others have failed to discriminate carefully between *ius fetiale*, and *ius gentium*. The main difference between the two may perhaps be very briefly stated to be that, whereas the *ius gentium* represents sometimes the ideal to be aimed at which serves as a guide—thus exhibiting

¹ *Amor.* ii. 4. 7.

² Cf. Cic. *De offic.* iii. 29.—In *De offic.* i. 11, he speaks of *iura belli* with the same meaning.

³ *Dig.* l. 7. 17.

⁴ As to the spelling of this word, see *infra*, on the *fetials*.

⁵ Cf. the present writer's contribution on Zouche in the *Journal of the Society of Comparative Legislation*, New Series, No. xx. April, 1909, pp. 281-304; p. 282.

⁶ *Op. cit.*

⁷ C. Calvo, *Le droit international*, 6 vols. (Paris, 1888-1896), vol. i. p. 4.

an underlying relationship to the *ius naturale*,—and sometimes the actual substance of the law, the *ius fetiale* indicates rather the jurisdiction which takes cognizance of certain matters of the *ius gentium* (which, consequently, possesses wider extent), though, by a natural synecdochical process, the term (*ius fetiale*) is also applied to the body itself of these matters.

CHAPTER IV

THE POLICY OF ROME.—TO WHAT EXTENT SHE RECOGNIZED AN INTERNATIONAL LAW

Rome's foreign
policy—and
position of
international
law.

It has very often been maintained that Rome's foreign policy, her history of war and conquest made the very existence of international law impossible, and tended to transform her *ius fetiale* into a worthless formality, or a mere cover for imparting a legal semblance to illegal practices. Such an extreme assertion is far from being accurate. The history of Rome may have been a long series of wars and conquests; her temple of Janus, the guardian god of peace, as Suetonius says,¹ may have been closed, as an indication of established peace, only twice in seven centuries, from Rome's foundation to the reign of Augustus. Notwithstanding this she evolved and practised a large body of principles which have furnished the basis of international law for all time. Nations like the Hellenic excelled in art, literature, and philosophy; the Roman genius lay in conquest, imperial expansion, in the practical sphere of political organization and juridical development.

Roman
diplomatic
methods—
frequently
rigorous
but many
relaxations.

Roman diplomatic methods were no doubt rigorous from time to time, but in practice various important relaxations were frequently adopted, such as, for example, her insistence on the right of sanctuary at Teos, in 193 B.C.,²—a recognition which by no means conduced to her selfish interests. By concentrating their

¹ *August.* 22; cf. Paulus Orosius, *Hist.* vi. 20, 21, 22; Ovid, *Fasti*, i. 121-124.

² See on this subject *infra*.

attention on the great wars of Rome, the majority of writers lamentably neglect her pacific proceedings.

The interest of State was, of course (then as now), the supreme consideration. Rome's supremacy was ever ready to assert itself; but often she protected weaker States. Thus, after the battle of Cynoscephalae, where she defeated Philip of Macedon, she had then no serious rivals in the East; nevertheless, she respected innocent liberty and encouraged sentiments of local independence. "Ainsi le mépris des nationalités n'aveuglait pas la nation conquérante, et les plus petits peuples l'ont trouvée souvent attentive à leur honneur comme à leur intérêt."¹ In some cases, however, it must be admitted that Rome's supremacy was affirmed even when, animated by political interests, she proclaimed the liberty of certain nations; for example, the liberty of the Greeks of Europe and Asia was declared by a *senatusconsultum*.² A similar enactment absolved for a time Masinissa, king of the Eastern Numidians, from the Roman *imperium*;³ and Livy mentions another declaration of this kind in the case of the Corinthians, Phocians, and Locrians.⁴ Such proceedings are confessedly rather the unilateral acts of supremacy than bilateral conventions of an international character.

Cicero often emphasizes that justice must be observed even towards the weakest and meanest—"meminerimus autem etiam adversus infimos justitiam esse servandam,"⁵ and he could have readily cited in support of this principle numerous examples from Roman history. The Roman writers all celebrate the justice, the equity, the nobility of their fatherland. Rome is described as the flower of humanity, the model of kindness and fairness. Virgil speaks of "rerum

Justice and fairness to weaker nations.

Praise of Roman method.

¹ Egger, *op. cit.* p. 160.

² Plut. *Flam.* 10.

³ Val. Max. vii. 2-6.

⁴ Liv. xxxiii. 32: "Senatus Romanus liberos, immunes, suis legibus iubet esse Corinthios Phocenses, Locriensesque omnes."

⁵ *De offic.* i. 13.

pulcherrima Roma," Livy¹ says the Roman Empire was the greatest after that of the gods, and that justice and good faith conduced to the attainment of such a great position. The historians and other writers of Greece, Diodorus the Sicilian, Dionysius of Halicarnassus, Polybius of Megalopolis, Plutarch the Boeotian, though the victims of Rome's domination, added to the glorification of their conquerors.² Bodin, writing in the last quarter of the sixteenth century, attributed the greatness of Rome to her magnanimity, and especially to her justice: "La république des Romains a fleuri en justice et surpassé celle de Lacédémone, parce que les Romains n'avaient pas seulement la magnanimité, mais aussi la vraie justice leur était comme un sujet auquel ils adressaient toutes leurs actions."³ The Italian jurist Gravina, going even further, holds that the Roman domination was the only just one, as it was based on reason; the Romans considered as their own enemies only the enemies of humanity; their treatment of the conquered peoples was exemplary, inasmuch as they were deprived only of the power to do harm; slavery was imposed only on those who preferred a savage existence to social life; civilized peoples were permitted to enjoy their own laws; in a word, the Roman aim was to spread civilization and to realize universal association.⁴ Bossuet is also high in his praise: "Je ne sais s'il y eut jamais, dans un grand empire, un gouvernement plus sage et plus modéré qu'a été celui des Romains dans les

¹ xliv. 1.

² Cf. Diod. Sic. xxxii. 4, 5; Dion. Hal. ii. 72; Polyb. xviii. 20; Plut. *Numa*, 16.

³ *Les six livres de la République* (1576), i. 1.

⁴ *De jure naturali, gentium*, etc. (in *Origines juris civilis*, Lipsiae, 1708) p. 255: "Hinc Romanorum unice, atque undequaque justissimum fuit imperium, quippe fundatum in vertice rationis humanae. ... Humanitatis enim hostes tantum Romani ducebant suos... quibus victis... nihil eripiebant praeter injuriae licentiam; nec servitute premebant, nisi qui rationis legibus repugnarent, et civili vitae immanem vivendi ritum anteponerent..."

provinces."¹ Herder was among the first to assume a contrary attitude.²

It is necessary, however, to distinguish between the earlier and the later period of Roman history. In the earlier period, say to the conclusion of the Second Punic War, there obtained a readier recognition of rules of international conduct, to which Rome considered herself as well as all other civilized nations subject; the principles of reciprocity and juridical equality were largely accepted; and political and commercial intercourse between Rome and other States for the most part proceeded in accordance therewith. This condition of things was to some extent due, no doubt, to the fact that at this time Rome came into contact with powerful Italian nations. After the victory of Porsenna, for example, she was obliged to submit to conditions which were by no means to her liking.³

Important to distinguish between the earlier and the later periods of Roman history.

But a gradual transformation was already perceptible at the time of the conflict with Pyrrhus. After the victory at Zama (B.C. 202) the law of nations suffered an indubitable declension. Carthage became the dependent ally of the Roman Republic, and Philip and Antiochus were obliged to submit to humiliating terms. Barbarian invaders were quickly dispersed. Rome regarding these peoples as uncivilized admitted no legal obligations towards them. The principle of reciprocity was disappearing; though various rules, as,

Decline of Roman law of nations in later epoch.

¹ *V^e avertissement aux Protestants*; cf. his *Discours sur l'histoire universelle*, 3^e partie, chap. vi.

² Cf. *Ideen zur Philosophie der Geschichte*, xiv. 3.

³ Tacit. *Hist.* iii. 72; Dion. Hal. v. 34; Pliny, *Hist. Nat.* xxiv. 4: "Porsenna defendit ne ferro nisi in agricultura uterentur,"—which indicates a thorough submission on the part of the Romans.—The story is that Porsenna offered peace to the Romans on condition of their restoring to the Veientes the land which they had taken from them; that these terms were accepted, and that Porsenna then withdrew his troops from the Janiculum after receiving twenty hostages from the Romans.

for example, those concerning the inviolability of ambassadors and the fetial procedure, were always admitted to be binding. The Senate was loth to decide judicially between conflicting claims; it rather imposed its will, and arrived at conclusions based on considerations of State interest, neglecting the demands of impartial justice. Thus, when the truce conceded to Perseus was being discussed in the senate, the oldest senators, inspired by Rome's earlier and nobler conduct, condemned the action of the deputies in having deceived him, but, as Livy says, that part of the senate prevailed in whom self-interest predominated over fairness and justice,—“... vicit tamen ea pars senatus cui potior utilis quam honesti cura erat.”¹

Roman
supremacy
after the second
Punic war.

Indeed, in the period after the Second Punic War, Rome's supremacy was not only established in fact, but was consistently insisted on or implied in political relationships with other nations. After their defeat, cities were ostensibly permitted to retain their independence, but in actual practice they were, as allies of Rome, virtually under her protection and hegemony. The usual clause in treaties—“ut eosdem amicos et hostes haberent”—implied a complete submission to Rome in regard, at least, to foreign relationships. Thus, internally these cities preserved a pseudo-autonomy, externally they were deprived of effective sovereignty. In the case of their foreign conflicts Rome intervened as arbiter, in their intestine discords she interposed as mediator; and sometimes even, when public interests required it, the Senate assumed direct control.²

Proud boasts
of Roman
writers of this
period.

Roman writers of this period proudly insist on the supremacy of the Republic; her people are designated the “princeps orbis terrarum populus,” and the world is regarded as the “orbis Romanus.” Similarly, subsequent writers panegyryze the earlier exploits and transcendent glory of Rome; but, in some cases, they

¹ Liv. xlii. 47.

² Cf. Chauveau, *op. cit.*, *init.*

also deplore the manifest decline from former greatness. Thus Tibullus writes :

"Roma, tuum nomen terris fatale regendis,
Qua sua de caelo prospicit arva Ceres,
Quaque patent ortus et qua fluitantibus undis
Solis anhelantes abluit amnis equos."¹

(Rome, thy name is destined to rule the Earth, wherever Ceres from her heaven looks down on her fields, from the regions where the sun rises to where his panting steeds bathe in the restless waves.)

Petronius :

"Orbem iam totum victor Romanus habebat :
qua mare, qua terrae, qua sidus currit utrumque."²

(Rome had now conquered the whole world, as far as earth extends or ocean rolls, from the rising to the setting sun.)

Lucan :

"... Quo latius orbem
Possedit, citius per prospera fata cucurrit.
Omne tibi bellum gentes dedit omnibus annis :
Te geminum Titan procedere vidit in axem."³

(The poet laments the slaughter in the conflict between Pompey and Caesar, and refers to Rome's earlier glory and her vanishing greatness. "The greater her possessions have been in the world, the more speedily have her prospering destinies run by. Throughout all ages, every war has given thee conquered nations ; thee has Titan beheld approaching both poles.")

The cosmopolitan tendencies of the later epoch never really displaced the intense patriotism. Cicero, under the influence of Greek philosophical doctrines, asserts that wisdom and virtue recognize no exile ;⁴ nevertheless, as a true Roman, he advises the exiled Marcellus to appeal to Caesar's clemency, adding that if death threatened him he would certainly rather suffer it in his own country than in a foreign land.⁵ Ovid, enthusiastic

Narrower
patriotism and
wider cos-
mopolitanism.

¹ ii. 5. 57-60.

² *Saturae*, c. 119 ; ed. F. Buecheler (Berolini, 1904).—Cf. also Cic. *Pro Muraena* ; Marcellinus, xix. ; xxiii.

³ *De bello civili*, vii. 419-422. ⁴ *Tusc.* v. 37 ; *Pro Milone*, 37.

⁵ *Epist.* iv. 7.—Cf. *Pro Milone*, 38.

over a Greek maxim, says all the world is a land for the brave man,¹ but his Roman spirit betrays itself elsewhere.² Seneca, when banished to Corsica by Claudius, makes use of Stoic arguments as to exile,³ but afterwards he avows a secret anguish.⁴

Roman international law shows progress.

Roman law of nations the basis of the modern system.

Erroneous inferences of modern critics.

And yet when all is said, when every possible detraction is made, Roman international law shows a great advance on that of Greece (as Greek international law was an advance on that of the other nations of antiquity), inasmuch as it eliminates ideas of religious exclusiveness, and imparts to it a true juridical foundation. Even in theory, the generous conceptions of Cicero⁵ show a broader outlook than the rigorous doctrines of Plato and Aristotle in regard, for example, to the treatment of foreigners. And not only is Roman international law progressive; it furnishes, indeed (it is not amiss to repeat), a great part of the groundwork of our modern system. As to the extent of Rome's recognition of international law, writers have expressed very different opinions. The majority of writers,—one must in all conscientiousness say,—have exhibited a lamentable lack of scientific method and argumentative precision. Often their assertions are mere indiscriminating repetitions of the dogmatic opinions of earlier writers, who usually generalized after merely superficial inquiry, and were often misled by a casual remark found in the classical authors, such as, for instance, “ubi solitudinem faciunt, pacem appellant” (as the Briton Calgacus is made to say),⁶ the “debellare superbos” of Virgil, or by such statements as, “adversus hostem aeterna auctoritas esto” from the XII. Tables. In some of these cases,

¹ *Fasti*, i. 393.—Cf. the saying of Democritus, as cited by Stobaeus (*Florilegium*, xl. 7): ‘Ἀνδρὶ σοφῷ πᾶσα γῆ βατή· ψυχῆς γὰρ ἀγαθῆς πατρὶς ὁ ξύμπας κόσμος. (For the wise man every country is habitable; since to the virtuous soul all the world is a fatherland.)

² *Tristia*, i. 3.

³ *Consol. ad Helv.* vi. viii. etc.

⁴ *Epigramm.* i.; *Consol. ad Polyb.* 32.

⁵ *De off.* i. 7 and 13; ii. 8.

⁶ Tacit. *Agric.* 30.

actual facts are carelessly inferred from rhetorical flourishes, in others expressions are taken out of their context, and the real significance of the terminology is lost sight of. As a recent author says, the legal exclusiveness of Rome has been strangely exaggerated by various writers, to the extent of assimilating it to barbarism,—“... cercarono rinforzare i loro risultati, esagerando fantasticamente l'esclusivismo dei Romani, tanto da assimilarlo ... ai selvaggi.”¹ Again, occasionally Rome's time of decadence—her period of avarice, despotism, and irreligion—is unjustly taken as representative of the whole extent of her history; then we get such a dogmatic utterance as: “le prétendu droit des gens des Romains n'est qu'une chimère.”² Others—for example, Bonfilis—insist on the perfect reciprocity of obligations as the indispensable criterion, and finding that this reciprocity is not always perfect and absolute, in conformity with modern notions, conclude that international law was a non-entity in Rome; that the various matters relating to the conclusion of treaties of peace and to the international status of ambassadors were of a political rather than of a juridical nature.³

If the law of force was the only dispensation, how is it possible to explain the formation of alliances between Rome and less powerful cities, and the agreement on reciprocal concessions and mutual treatment, the resort to arbitral procedure, the functions of the tribunal of recuperators? How is it possible to account for the institution of *hospitium publicum*, provisions for naturalization, the practice of extradition, the immunity of ambassadors, the regular procedure and formalities in the conclusion of treaties, the conception of protec-

Roman
practices and
institutions
showing
adherence to
law.

¹ Baviera, *op. cit.* vol. i. fasc. 2, p. 271.

² M. Revon, *L'arbitrage international* (Paris, 1892), p. 101.

³ H. Bonfilis, *Manuel de droit international public* (Paris, 1905), p. 35 : “Mais ces faits, dictés par la politique, ne peuvent être interprétés comme constituant des actes juridiques, comme des manifestations et des applications d'un droit international.”

torates, the notion of territory from an international point of view? How is it, on this assumption, possible to account for the constant insistence on the necessity of due declaration before the actual commencement of hostilities, and on the observation of certain regularized proceedings preliminary thereto, and also on the right of asylum, the sanction of pledged faith whether in peace or war, the granting of safe-conducts, the regulations as to treatment of the conquered enemy and captured property, the burial of the dead, truces, armistices, the ransom and exchange of prisoners, the doctrine of postliminium, the position of hostages? How is it possible to account for the use of such expressions as "ius belli et pacis," the adoption of phrases of municipal law in questions of foreign relationships, e.g. "condicere pater patratus," "dare fieri solvi oportere," "condicere bellum," "pacem spondere," "agere" or "vindicare ex iure belli," "pignus facere," "ius persolvere, adipisci," and the like.¹ Do not all these matters, even on merely superficial examination, show clearly that a system of law was in course of development, of which a large body was already recognized, for regularizing and controlling international relationships, and for settling disputes arising therefrom by means other than that of violence?

Attributing to religious sanction does not necessarily destroy juridical significance.

Further, to attribute what rules there were to the sanction of religion is not at all tantamount to a denial of their validity and applicability, and hence their relation to juridical economy. The *fas* prepares the way for and merges into *ius*; custom makes law; and religion makes custom.

Conformity of foreign relationships to a certain body of rules.

Again, it is not an indispensable condition in the case of ancient international law that there should be a universal recognition of the autonomy of States, of their sovereign power to the extent of imparting to them an objective juridical personality. It suffices, it is submitted, that there should be simply a certain body of rules to which foreign relationships, public or private, conformed. And such a body of rules certainly existed.

¹ Cf. Baviera, *op. cit.* p. 272.

Of course, there was not a complete system elaborately organized and scientifically constructed, so as to point to a solution of all possible difficulties beforehand. To judge entirely and exclusively from the modern point of view is to be hopelessly blind to the elemental phenomenon of growth, the changeability of human conditions, and to the inherent elasticity of law as being a reflex of, or being dependent on, those conditions. M. Revon emphasizes the unfixed character of the law of nations and the perpetual change in its forms, and compares the process of its evolution to the monotonous and rhythmic movement of the ebb and flow of the sea : "Le droit des gens, en effet, n'est point une science fixe et immuable : bien au contraire, il se développe sans cesse, il change éternellement de formes ; tour à tour il avance et il recule, selon les vicissitudes de l'histoire et suivant un rythme monotone qui est comme le flux et le reflux d'une mer."¹ The same author, who—curiously enough—elsewhere said that the Roman international law was nothing but a chimera,² asks whether we are now really more advanced in international law than the Romans.³ In certain matters it is clear we have made substantial progress, but in other points, he maintains, we have retrograded ; for example, in the middle ages the oath was not always respected as faithfully as in ancient Rome ; and nearer our own times, in the seventeenth century, Grotius proclaims the unquestioned right of belligerents to massacre the women and children of the enemy ; and in our more modern age the due declaration of war which the Romans always conformed to has not been invariably observed.

The caution of not confounding modern conceptions, modern method and scope with the ancient cannot be too strongly emphasized. M. Fusinato well points out the danger of judging the legal relationships of ancient

Imperfect system does not mean no system.

Criticism and the modern bias.

Law of nations subject to perpetual change.

In various matters the Roman law of nations in advance of later law.

To discriminate between the modern point of view and the ancient.

¹ M. Revon, *De l'existence du droit international sous la république romaine* (in *Revue générale du droit, de la législation, et de la jurisprudence*, Paris, 1891, t. xv. pp. 394-405 ; 504-510), p. 509.

² See *supra*, p. 107.

³ *De l'existence*, etc. *loc. cit.* pp. 509, 510.

peoples according to the comprehensive and complex ideas fostered by our vast modern culture and knowledge, and of inferring the absence of juridical conditions, through a confusion of objective law with some particular form assumed at a given historical moment. "Gli è che troppo spesso, nel ricercare quali fossero le relazioni di diritto dei popoli antichi, si giudicarono quelle relazioni con i vasti criterî che ne consente la sviluppata cultura dei nostri tempi; e come allora quelle relazioni si trovarono governate dai principî talvolta in opposizione assoluta con i nostri, si confuse il diritto, obiettivamente considerato, con la forma particolare che esso può assumere in un determinato momento storico, e se ne dedusse la negazione della esistenza di quelle relazioni medesime."¹

Recognition of
a true law of
nations by
Rome in her
first period.

*Civitas
gentium.*
Juridical
consciousness.
Reciprocity.

Such
recognition in
the case of
sovereign
States.

One may go further than merely assert the existence of a body of rules to which foreign relationships conformed. It may, in truth, be said that (at all events, in the first period of her history) Rome recognized the existence of sovereign and independent States other than her own, that she had clear notions of a *civitas gentium*, and possessed an international juridical consciousness, and admitted the principle of reciprocity.² Such recognition of international law depends, of course, on the fact that other States to which its provisions may apply are properly constituted. Juridical capacity was not admitted in the absence of a duly established political organization. The principle of reciprocity was not entertained in the case of a mere conglomeration of people, devoid of political unity. Just as the slave was deemed to be incapable of enjoying the provisions of the civil law, which was reserved for *cives* alone, so were the benefits conferred by the law of nations, which was reserved for *civitates* alone, withheld from a disorganized group of individuals,—in Cicero's phrase: "omnis hominum coetus quoque modo congregatus sed coetus

¹ *Dei feziali* . . . *loc. cit.* p. 454.

² Cf. Baviera, *loc. cit.* vol. i. fasc. 3, pp. 463 *seq.*

multitudinis iuris consensu, et utilitatis commune consociatus."¹ Only with States as political organisms, as "free nations,"² did Rome negotiate her *foedera*, her *sponsiones*, her *indutiae*, or exchange ambassadors, or make use of the *indictio belli*; and, likewise, in the general relationships of war Rome invariably made a similar distinction between "regular" and "irregular" enemies.

To the Romans the treaty-making power presented two aspects: on the one hand, in a negative sense, a treaty could not be entered into with a people not possessing autonomy, juridical and political individuality, on the other hand, in a positive sense, the bilateral character of a convention disappeared as soon as a contracting people's independent personality was lost or impaired. For the treaty-making capacity implied then as now a sovereign will with its power of deliberate choice to be bound in this or that way.³

Treaty-making power—and juridical and political personality.

Other arguments, well emphasized by M. Baviera,⁴ showing the co-existence of politically independent and sovereign States are found in the various formalities necessary for the conclusion of *foedera*, in the power and practice of coining money independently, in the mutual recognition of the *ius exilii* and of the *ius postliminii*, and in the acceptance by belligerents of equality of treatment.

The money-coining power was universally considered an exclusive privilege of sovereign States. As Mommsen points out, the recognition of the very existence of an organized State was a corollary of the recognition of a people's right to coin its own money. "Das Münzrecht ist, rechtlich betrachtet, ein Theil der Gesetzgebung und hat auch im Alterthum wie heut zu Tage als Bestandtheil und Zeichen der staatlichen Souveränität

Money-coining power—and sovereignty.

¹ *De Rep.* i. 25; cf. *Philipp.* iv. 5. 6.

² On meaning of "free nations," see *infra*, as to when declaration of war is essential, and when it may be dispensed with.

³ See *infra*, for instances, such as the *foedus Cassianum* (261 B.C.), where the sovereignty of the Latini was clearly recognized by Rome.

⁴ *Loc. cit.* pp. 474 *seq.*

gegolten."¹ The Latin cities, bound to Rome either by a pact of alliance or by nationality, were not only independent but sovereign, and from the right of sovereignty is derived the right of coinage. They could have adopted, had they been so disposed, special systems of currency; but, in fact, they made them agree with the Roman monetary system as far as their habits, circumstances, and local needs permitted them.² On the other hand, to deprive a people of its autonomy, or to reduce it to political semi-independence, is *ipso facto* to take away from it the right of coinage entirely in the case of the first alternative, or, in the case of the second alternative, to impose certain restrictions on it, as, for example, a limitation to silver coin or to bronze coin, as the case may be.³ Thus the peoples allied to Rome on the basis of a *foedus aequum*, that is, on an equal footing as to rights and obligations, had their own respective money systems, inasmuch as they enjoyed sovereignty. In the confederation of Rome with the various nations of Italy, as Mommsen reminds us, we may see that the States which possessed the greatest measure of political independence were precisely those that possessed the fullest right of coinage. The confederates of Rome came within this category, and amongst them were the Latin colonies as the most favoured.⁴

¹ *Geschichte des römischen Münzwesens*, p. 309.

² Mommsen, *ibid.* p. 182: "Es liegt danach nahe, diese ganze Klasse von Münzen auf die durch Italien zerstreuten Gemeinden latinischen Rechts, also ausser dem wenigen in Latium übrig gebliebenen altlatinischen und den diesen später gleichgestellten Bundesgemeinden vornämlich auf die latinischen Colonien zu beziehen; diesen stand theils diejenige Souveränität zu, welche zur Ausübung des Münzrechts erfordert ward, theils richteten sie sich begreiflicher Weise, wo die bestehenden Circulationsverhältnisse es gestatteten, im Allgemeinen nach dem Muster Roms."

³ Examples in Mommsen, *ibid.*, *passim*.

⁴ *Ibid.* p. 309: "Aehnliches dürfen wir auch in der römisch-italischen Symmachie zu finden erwarten; wir werden das Münzrecht zunächst und am vollständigsten bei den Gemeinden voraussetzen haben, die ihre staatliche Selbständigkeit am vollständigsten gewahrt hatten. Dies sind die mit Rom föderirten Staaten überhaupt, vor

Further, the adoption of the *ius exilii* and of the *ius postliminii* indicates the enjoyment of full sovereignty. *Ius exilii* implied a mutual recognition of political autonomy, and enabled an exile of one State to be domiciled undisturbed in another, and often to acquire its citizenship.¹ And *ius postliminii* was likewise granted to independent nations, but not admitted in the case of those not possessing sovereign power; as Festus says, referring to Aulus Gellius: "Cum populis liberis et cum foederatis et cum regibus postliminium nobis est uti cum hostibus; quae nationes in dicione sunt his postliminium nullum est."²

In war relationships, again, the principle of reciprocity is also attested in the proceedings and formulae of the fetials, in various express laws, *e.g.* that of Pomponius in the *Digest*,³ which recognizes in the enemy of Rome the same rights and privileges and in the same measure as are competent in the Romans, whether it be relative to the acquisition of booty, or to the reduction of prisoners to slavery, or to *ius postliminii*. The principle is similarly admitted in the conclusion of *sponsiones*, that is, conventions entered into by generals in the field, in *indutiae* (truces and armistices), in the granting of safe-conducts and their admitted protective force, in negotiation for the release, ransom, or exchange of prisoners, and in several other customs and institutions. M. Baviera thus concludes as to the existence of the principles of equality and reciprocity, based on the recognition of political independence, sovereignty, and juridical personality—at least in the first period of Rome's history—both in pacific and in belligerent relationships: "Reciprocità stretta eguaglianza rigorosa vi fu, specie nel primo periodo della storia: reciprocità ed eguaglianza che scaturivano immediatamente e necessariamente dal riconoscimento della indipendenza e

Ius exilii and
ius postliminii
in relation to
sovereignty.

Reciprocity
in war
relationships.

Booty.

Postliminy.
Sponsiones.

Truces.
Safe-conducts.

Prisoners.

allen Dingen also die bedeutendste und bestgestellte Klasse derselben, die lateinischen Colonien."

¹ Cf. Cic. *Pro Balbo*, 11.

² On *postliminium*, see *infra*.

³ *Dig.* xlix. 15. 15. 2.

della sovranità di tali popoli coi quali Roma venne in rapporti sia pacifici che belligeri, essendo inconcepibile il contrario."¹ The contrary, indeed, is inconceivable, notwithstanding the assertions of detractors and the carpings of the prejudiced.

Juridical
basis of these
principles.

Moreover, these principles rested on a truly juridical basis, established by an international juridical consciousness, though (as has already been suggested) we must here guard against judging indiscriminately from the point of view of our modern conceptions and our broad outlook. The *regula iuris* conferred a right and imposed a corresponding obligation; and it was conceived that a recalcitrant State could be lawfully compelled by the other States duly to fulfil its obligations,—so that, at bottom, the ancient ultimate sanction was not different from the modern. The juridical basis is evidenced in the frequent clauses in treaties, determining the relationships of *commercium* and *connubium*, regulating the rights and duties of the individual citizen of the States in question, or of States in their sovereign capacity, marking out the sphere of free maritime navigation, providing for *recuperatio* and *editio*. It is also shown in the necessary formalities of the established procedure, in the strict expression of the solemn formulas. As Ihering says, form, especially in ancient law, is in regard to juridical acts, what the imprint is to the coin.² The form with which the stipulation of the *foedus* or of the *sponsio* was invested indicated the intention on the part of the contracting parties to set up a legal bond, a *vinculum iuris*. As in the case of the private law, it is indispensable that there should be an intention voluntarily expressed by a promisor, and a corresponding expectation signified by a promisee, that there should be, in the language of the

¹ *Loc. cit.* p. 478.

² R. von Ihering, *Geist des römischen Rechts auf den verschiedenen Stufen seiner Entwicklung*, 3 Bde. (Leipzig, 1852-1878), vol. iii. p. 187.

Digest, "duorum pluriumve in idem placitum consensus."¹ The consensus in the case of the treaty formula 'Pacem futuram spondes?'² relating to States imposes an obligation marked by the same legal character as that in the case of the civil formula 'Dari spondes? spondeo' relating to private citizens.

When a treaty was broken a reason was generally advanced for such conduct,—a reason which was considered by the infringing party to be of juridical force. The breaking of a treaty by Rome may sometimes seem, as M. Baviera observes, to be due to a mere pretext, to a piece of chicanery; but it was, none the less, usually averred to be consequent on the conflicting interpretations of an ambiguous clause, or on the omission of some essential formality, or on the violation of some equitable principle. Thus in the case of the annulment of the treaty of the Caudine Forks, the *mala fides* of the Romans may have been undeniable; they, however, sought to justify their action juridically on the ground that the treaty had been concluded without the authority of the Roman people, and by one who had not the power to do so.³

Violation of
treaties by
Rome—and
alleged just
cause.

Belligerent relationships, too, were deemed to possess a juridical foundation. The imputation that the fetials belonged entirely to a religious sphere is not really valid. In the first place, as has been insisted on above, a religious connection does not necessarily militate against, at least does not destroy, juridical significance, and, in the second place, the college of fetials was not

Legal basis
of war
relationships.

¹ *Dig.* ii. 14. 1. 2; cf. *Dig.* l. 12. 3.

² Gaius, *Inst.* iii. 94.

³ Baviera, *loc. cit.* p. 485: "... La rottura è rappresentata sempre da un motivo giuridico, un pretesto, un cavillo se vogliamo, ma poggiato sul conflitto di interpretazione di una clausola ambigua, sulla mancanza di una formalità, sulla violazione di un principio di diritto. Il primo trattato annullato è quello delle forche Caudine nel 434. Nessuno nega la mala fede Romana. Ma una teoria giuridica sta a giustificarla: è nullo, si disse, quel trattato concluso senza l'approvazione del popolo, da quella persona che non ha il potere di farlo."

exclusively a religious body. When engaged in the performance of ambassadorial functions they bore a purely political or diplomatic character ; and when they were called upon to pronounce on the validity or otherwise of the suggested cause of war, on the legitimacy of relative claims, they acted in a purely judicial capacity. To find in such functions more or less distant associations with religion does not relegate them *in toto* to the religious sphere and deprive them of a legal nature ; if we but extend our ramifications far enough we shall inevitably find a connection or kinship between all things. For the Romans warfare must be regular, *iustum* ;¹ the idea of war, *more latronum*, was repugnant to them. Just as the *interpellatio* was indispensable in private law, so was it necessary in international relationships duly to set forth one's claim, to make a formal demand for satisfaction, *repetitio rerum*, or *clarigatio*, before resorting to violent measures. War was not conceived by the Romans as a terrible struggle of material force, to use the phraseology of the previously quoted Italian writer,² but it assumed the juridical position of a true *actio* ; it operated as the ultimate and supreme *ratio* for effecting a restitution (should satisfaction have been denied) of violated rights, or for obtaining compensation therefor.

Existence of
international
juridical
consciousness.

That this juridical basis of international relationships proceeded from an international juridical consciousness³ cannot be doubted. And here, again, it is necessary

¹ For the juridical basis of the various causes of war, see *infra* ; and for *iustum bellum*, see more fully below.

² *Loc. cit.* p. 492.

³ On the significance and content of the notion of international juridical consciousness, see (as cited by Baviera) Fallati, *Die Genesis der Völkergesellschaft* (in *Zeitschrift für Staatswissenschaft*, 1884) ; F. de Martens, *Traité de droit international*, 3 vols. (Trad. du russe par A. Léo, Paris, 1883), vol. i. §§45-52 (on "droit de la communauté internationale") ; A. Rivier, *Principes du droit des gens*, 2 vols. (Paris, 1896), vol. i. pp. 7 *seq.* ; F. von Holtzendorff, *Handbuch des Völkerrechts*, 4 Bde. (Hamburg, 1885-1889), vol. i. § 10.

to insist that the international juridical consciousness of men is not a stable, immutable entity throughout the ages; it is not some peculiarly inexplicable endowment by which men and nations are actuated to conduct themselves in accordance with eternally valid prescriptions; rather, it changes in proportion as the spirit and the structure of society and the relationships of nations change. Cicero's *civitas gentium* is not a mere metaphysical figment of the speculative imagination; his *civitas* (or *societas*) *gentium* is conceived to be composed of sovereign and independent States enjoying their own *leges, iura, iudicia, suffragia*,—their own legal rights and civic privileges. The recognition of a certain *comitas gentium* is shown, amongst other incidents, in the conferring of honours by the Romans on foreign princes by means of titles or presents, as, for instance, in the case of Masinissa;¹ and it is shown also in the acceptance of the decisions of foreign tribunals. The existence and the influence of a juridical consciousness is clearly evidenced in the whole fabric of the law of nations as accepted by the Romans. It is manifested in the practice of *deditio* (as corresponding to the civil procedure of *noxae datio*, noxal surrender of the delinquent), which was applicable to certain prescribed cases, it is indicated in a multiplicity of institutions and doctrines, such as the *hospitium publicum* and *privatum*, the *ius honorarium* (in reference to peregrins), the *ius legationis*, the *foedera, sponsiones*, and *indutiae*, the *ius fetiale*, the *recuperatio*, the *ius postliminii*, the doctrine of balance of power, the reference to arbitration and acceptance of the arbitral judgment, and in various other principles and institutions.

It was stated above, in connection with the affair of the Caudine Forks, that Rome was undeniably guilty of *mala fides*, or of a violation of the spirit, if not of the letter, of the law. Rome, in truth, conceived *fides* to be the underlying basis of all international relationships, Fides the basis of all international relationships.

¹ Liv. xxvii. 4; xxxi. 10, 11.

the determining factor of all acts of private and public conduct. Sometimes the *bona fides* was expressly guaranteed by a special clause or stipulation, reinforced by a solemn oath ; more frequently it was implicit. The violation of the oath was universally considered a deliberate offence against the gods themselves, who exacted vengeance by pursuing to destruction not only the malefactor, but also his family, deemed to be tainted with his perfidy ; it was likewise an offence against human law. All races of antiquity recognized *bona fides* to be an indispensable attribute of private, of public, and of international dealings, indeed, of all conceivable transactions. "The more enlightened writers of Chinese antiquity condemn the practice of exchanging hostages, as tending to keep up a state of *quasi* hostility and mutual mistrust ; and no writers of any nation have been more emphatic in insisting on good faith as a cardinal virtue in all international transactions. . . . Confucius, speaking of a State, says : 'Of the three essentials, the greatest is good faith. Without a revenue and without an army a State may still exist, but it cannot exist without good faith.'"¹

In the Hellenic world the oath was deemed to possess a sacred binding force ; the oracles threatened with dire vengeance would-be violators.² Some of the Greek peoples nevertheless became notorious for their perfidiousness ; *e.g.* a counterfeit coin was termed a 'Thessalian coin,' an act of treachery was stigmatized as a 'Thessalian trick.' Crete was reproached by poets and historians for her faithlessness,—*Κρήτες ἀεὶ ψεύσται*, writes Callimachus,³ the Alexandrian poet and grammarian, in the third century before the Christian era ; Plutarch reports that her people were treacherous in war ;⁴ her name furnished the verb *κρητίζειν*, which meant "to lie," *πρὸς Κρήτα κρητίζειν*⁵ meaning "to

Force of oath,
and divine
sanction.

The oath in
oriental
antiquity.

The oath in
Greece.

¹ W. A. P. Martin, *Traces of international law in ancient China*, *loc. cit.* p. 74.

² Cf. Herodot. vi. 86.

³ *Hymn. in Jov.* 8.

⁴ *Philop.* 13 ; *Lysand.* 20 ; *Aemil.* 23. ⁵ *Plut. Aemil.* 23 ; *Lysand.* 20.

outwit a knave." Similarly the Parians were proverbial for their apostasy; ἀναπαριάξειν meant to change sides like the Parians.¹

With the Romans, as Polybius, though a non-Roman, says,² the oath received greater respect. In his time, he states, there was a rash and foolish rejection of the gods by the Greeks, whose statesmen were addicted to falsifying their accounts, "though protected by ten checking-clerks, as many seals, and twice as many witnesses"; whereas the Romans, in their embassies and magistracies, kept their faith intact from pure respect to their oath—κατὰ τὸν ὅρκον πίστewς τηροῦσι τὸ καθήκον. But in subsequent chapters of his history Polybius admits that there was a considerable falling off by the Romans in this respect. Thus in the eighteenth book he says the decline was becoming apparent, though on the whole the Romans were comparatively incorruptible;³ and in the thirty-second book⁴ he points out the rampant degeneration due to luxury and sensual excesses, fostered by the importation of wealth after the destruction of the Macedonian monarchy and acquisition of universal supremacy. But men like Scipio, it is carefully noted, were throughout averse from all such viciousness.

However, in the international transactions of Rome, especially in her earlier period, *bona fides* was taken to be the fundamental principle of *aequitas*; it ever served as a criterion and guide in the interpretation and execution of undertakings.⁵ It was at the bottom of the praetorian edicts. It was the fundamental principle of the *ius legationis*,—for ambassadors were placed under the protection of public faith, of which, says Varro,⁶ the fetials were the ministers—"fidei publicae inter populos praeerant." More particularly was *fides* or

The oath in Rome.

Bona fides and *aequitas*.

¹ Ephorus (fl. 375 B.C.), *Fragm.* 107.

² vi. 56.

³ xviii. 35.

⁴ xxxii. 11.

⁵ Cic. *De offic.* iii. 29; *Dig.* xlviii. 4 (ad leg. Iul. mai.), 24 pr.

⁶ *De Ling. Lat.* v. 15.

*πίστις*¹ the very basis of *foedera* and *σπονδαί* (*sponsiones*). Festus² says *foedus* was so called "quia in foedere interponatur fides," and Livy frequently makes use of terminology to indicate the same conception: "in fidem venerunt . . . foedere ergo in amicitiam accepti;"³ "eo anno societas coepta est; in fidem populi Romani venisse."⁴ *Fides* was the indispensable condition in the case of a truce or armistice—"indutiarum fides,"⁵ "indutiarum fidem ruperat";⁶ as also in the case of *deditio*—"deditionis quam societatis fides sanctor erat,"⁷ "in fidem consulis dicionemque populi Romani sese tradebant,"⁸ "non in servitutem sed in fidem tuam nos tradidimus."⁹

Zeus Πίστιος
and Jupiter
Fidius.

The Romans had their Jupiter Fidius as the Greeks had their *Zeus Πίστιος*.¹⁰ *Fides* was deified by the Romans and provided with a temple and a cult. Horace, in an ode to Virgil, thus writes of this *numen*, as of other deified virtues:

" . . . cui Pudor et Justitiae soror
Incorruptae Fides, nudaque Veritas
Quando ullum inveniet parem ? " ¹¹

Practice not
always on a
level with
theory.

Of course, practice did not always keep pace with theory. In the ancient world, as well as in the modern, rules were not infrequently applied, in view of the exigencies of State interest, so as to admit of exceptions; and it is more just and profitable to infer our

¹ On the significance of *fides* generally, see Leist, *Gräco-Italische Rechtsgeschichte*, pp. 470 seq.; and H. A. A. Danz, *Der sacrale Schutz in römischen Rechtsverkehr* (Jena, 1857), *passim*.

² *De verborum significatione*, § 84 (an alphabetical epitome of the lost work under this title of Verrius Flaccus).

³ viii. 25.

⁴ viii. 27; cf. viii. 21; ix. 6; x. 45.

⁵ Liv. i. 30.

⁶ Liv. ix. 40.

⁷ Liv. vi. 9; cf. xxxii. 2; xxxvii. 32.

⁸ Liv. xxxvii. 45.

⁹ Liv. xxxvi. 28; cf. vii. 19; vii. 31; x. 43; xxxiv. 35; xxxvii. 6; xxxix. 54. (Most of the foregoing references to Livy are cited by Leist, *ibid.*)

¹⁰ Dion. Hal. iv. 58, etc.; cf. Danz, *op. cit.* pp. 127 seq.

¹¹ i. 24; ll. 6-8.—Cf. also his *Carm. Sec.* 57; Virg. *Aen.* i. 292.

conclusions as to ancient practices from their observance of those rules than from their rarer breach. Some writers animated, it would appear, by preconceptions antagonistic to Roman policy and conduct, are too prone to draw their generalizations from certain particular exceptions. For example, the alliance of the Romans with the Mamertines was certainly an indefensible act: it is duly censured by Polybius;¹ it may, as Niebuhr says, redound to the shame of Rome. But this or that occasional offence against the law of nations does not necessarily debar the Romans from the right of making complaints in regard to the *fides Punica*,² as Laurent seems to think. "Le peuple," he remarks in a highly moralizing tone, "qui n'avait pas rougi de s'allier aux Mamertins n'était pas en droit de parler de foi et de justice."³ If comparatively occasional infractions of the law made the whole law non-existent, no State could at any time be said to have possessed any legal system whatever. The truth is that the *fides* of the Romans in comparison with that of most of the contemporary peoples, at all events with that of the Carthaginians, was immaculate; wherefor they were, without shame or hypocrisy, entitled to complain of Punic treachery.

Roman *fides*
greater than
that of
contemporary
peoples.

¹ iii. 26.

² Cf. Florus, ii. 2.

³ *Op. cit.* vol. iii. p. 114.

CHAPTER V

GREECE AND FOREIGNERS

Greek notion
of citizenship.

THE Greek idea of citizenship was, from one point of view, closely bound up with that of the national religion, and, from another point of view, was in close correlation with that of membership of the phratry. The phratry (*φράτρα* or *φράτρη*) was, in the heroic age, a group of individuals of kindred race,¹ and in more historical times became a political division of people, originating from ties of blood and kinship. At Athens the *φράτρη* was a subdivision of the *φυλή*, just as at Rome the *curia*² was of the *tribus*.³ Each *φυλή* comprised three *φράτραι* or *φρατρίαί*, the members of which were called *φράτερες*⁴ (as those of a *φυλή* were termed *φυλέται*, and those of a *curia* were termed *curiales*), and were bound together by various religious rites peculiar to each. This organization suggests an inevitable connecting link between the family and the State. Exclusion from the city's worship was equivalent to a deprivation of citizenship. "Renonçait-on au

Link between
the family and
the State.

¹ Cf. *Iliad*, ii. 362.

² The Roman word *curiae* exactly corresponds to the Attic *φρατρίαί*; cf. Dion. Hal. ii. 7; Plut. *Poplic.* 7.

³ Plato, *Laws*, 746 D, 785 A; Isoc. *De pace*, 88.—Cf. Arist. *Polit.* ii. 5. 17; v. 8. 19.

⁴ It may be interesting to note the etymological relationships of this word. In the Sanscrit we get *bhrâtâ*, the form in Zend being *bhrâtâr*, with which the Latin *frater* is associated; the Gothic form is *brôthar*, *brôthrahans* (cf. *brother*, *brethren*), the Old High German is *bruodar* (which gives *bruder*), the Slavonic *bratru*. In Greek the word curiously assumes an exclusively political signification.

culte, on renonçait aux droits," as Fustel de Coulanges says.¹ The conferring of citizenship involved the taking of a solemn oath to worship the gods and fight for them—καὶ τὰ ἱερὰ τὰ πάτρια τιμήσω . . . ἀμυνῶ δὲ <sup>Citizenship—
and practice of
the city's
religion.</sup> ὑπὲρ ἱερῶν.² Demosthenes describes admission to civic privileges as a concession to take part in the sacred affairs of the city—μετεῖναι τῶν ἱερῶν,³ to share in the religious festivals and sacrifices—τελετῶν καὶ ἱερῶν καὶ τιμῶν μετέχειν.⁴ Presence at the common meals was an important duty; absence therefrom (as, for example, in Sparta) brought about a loss of privileges. Citizens were obliged to assist at the religious festivals of their respective cities.⁵ Similarly in Rome the enjoyment of political rights implied presence at the sacred ceremony of lustration,⁶ except in the case of soldiers engaged in the field.

The city's tutelary deities were considered to be antagonistic to the alien intruder, who was deemed to be incapable of participating in their worship. Should a town be captured by the enemy, and subsequently recaptured, an immediate purification of its temples was essential to obliterate the alien taint. Thus, when the Persians were defeated by the Athenians and Spartans at Plataea, 479 B.C., messengers were sent to Delphi to inquire what sacrifices were to be offered in honour of the victory. The oracle, says Plutarch, commanded them to erect an altar to Zeus, the Protector of the free, and not to sacrifice upon it until they had first extinguished all fires throughout the country, because it had been defiled by the presence of the barbarians, and had then brought a new fire <sup>Local deities
and aliens.</sup>

¹ *La cité antique* (Paris, 1900), p. 226.

² Cf. the entire formula as given by Pollux, viii. 105-6.

³ Demosth. *In Neaeram*, 104;—in connection with the decree relating to the Plataeans.

⁴ *Ibid.* 113.—Cf. also Isoc. *Panegy.* 43; and Strabo, ix. 3. 5.

⁵ *Corpus inscriptionum Graecarum*, No. 3641 B, vol. ii. p. 1131.

⁶ Dion. Hal. iv. 15; Cic. *Pro Caecina*, 34.

free from pollution from the hearth at Delphi, which is common to all Greece.¹

Jealousy of
sacred rites.

The Greeks' extreme jealousy of their sacred rites shows a certain oriental spirit. There is, of course, in several other respects a distinct kinship between the Hellenic race and Oriental peoples. "Dans l'Orient tout homme qui ne fait pas partie de la communion religieuse est impur ; sa présence souille les fidèles."² Herodotus reports that the Greek priests refused to make use of vessels and other objects that had been brought from abroad.³ Again, in the case of the Romans, Livy reports that after the defeat of the Gauls by Camillus, in 390 B.C., the Senate decreed that such temples as had been in the possession of the enemy should be restored, their bounds traced out, and due expiations made for them,—“fana omnia, quod ea hostis possedisset, restituerentur, terminarentur expiarenturque.”⁴ In the *Digest* there is an express provision for the purification by expiatory ceremonies of all places and objects that had in any way been in contact with a foreign enemy.⁵

Religious
exclusiveness
in antiquity.

The same spirit of exclusiveness—indeed, much more rigorous—was manifested amongst the nations of oriental antiquity generally. The Egyptians, for example, regarded themselves as autochthonous, as the human race *par excellence*,⁶—much in the same way

¹ Plut. *Aristid.* 20 : Περὶ δὲ θυσίας ἐρομένοις αὐτοῖς ἀνείλεν ὁ Πύθιος Διὸς Ἑλευθερίου βωμὸν ἰδρύσασθαι, θύσαι δὲ μὴ πρότερον ἢ τὸ κατὰ τὴν χώραν πῦρ ἀποσβέσαντας ὥς ὑπὸ τῶν βαρβάρων μεμιασμένον ἐναύσασθαι καθαρὸν ἐκ Δελφῶν ἀπὸ τῆς κοινῆς ἐστίας.

² Laurent, *op. cit.* ii. p. 104.

³ Herodot. v. 88 ; cf. Athenaeus, iv. 14.

⁴ Liv. v. 50.

⁵ *Dig.* xi. 7 (De religiosis et sumptibus funerum et ut funus ducere liceat), 36 : “Cum loca capta sunt ab hostibus, omnia desinunt religiosa vel sacra esse, sicut homines liberi in servitutem perveniunt ; quod si ab hac calamitate fuerint liberata, quasi quodam postliminio reversa pristino statui restituuntur.”

⁶ Cf. F. Laurent, *Droit civil international* (Bruxelles, 1880), vol. i. p. 114.

as the Hebrews, the Greeks, and other peoples did. The dwellers on the Nile shores were alone 'pure' men; their soil was sacred and pure; the rest of the universe was deemed polluted.¹ Aliens were criminals and savages. An inscription of Sesostris was to the effect that he governed Egypt and chastised foreign territory.² Though in course of time certain commercial privileges were conferred on foreigners, and mainly on the Greeks,³ the Egyptians, in the time of Herodotus, seem to have retained a certain personal aversion to the Greeks. "... No Egyptian man or woman," says Herodotus, "will kiss a Grecian on the mouth; or use the knife, spit, or cauldron of a Greek, or taste of the flesh of a pure ox that has been cut by a Grecian knife."⁴ There was far less stringency, in this respect, in the attitude of the Persians, who often showed remarkable tolerance towards strangers. For this reason illustrious exiles like Themistocles and Alcibiades preferred the refuge of the Persian Court to that of the Republics of Italy or of Sicily.⁵

In spite of the antagonism to foreigners,—an antagonism resting partly on religious motives and on pride of culture, and partly on the desire to preserve civic exclusiveness,—the Greeks gradually introduced considerable relaxations with regard to strangers. And it must be remembered in this connection, that aliens

Relaxations in
Greece as to
aliens.

¹ N. F. Rosellini, *I monumenti dell' Egitto e della Nubia*. . . . 8 tom. (Pisa, 1832-44), vol. iii. pt. i. pp. 37, 39, 51, 351; vol. iv. pp. 89, 90, 230.

² Rosellini, *op. cit.* vol. iv. p. 18; vol. iii. pt. i. p. 350; pt. ii. pp. 54, 163, 215. (The references in this and in the preceding note are cited by Laurent, *ibid.*)

³ J. M. Pardessus, *Collection de lois maritimes antérieures au xviii^e siècle* (Paris, 1828-45), vol. i. p. 52; cf. Herodot. ii. 178.

⁴ Herodot. ii. 41: τῶν εἵνεκα οὗτ' ἀνὴρ Αἰγύπτιος, οὔτε γυνὴ ἄνδρα Ἑλλήνα φιλήσειε ἂν τῷ στόματι, οὔδ' μαχαίρῃ ἀνδρὸς Ἑλλήνος χρήσεται, οὔδ' ὀβελοῖσι, οὔδ' λέβητι, οὔδ' κρέως καθαροῦ βοῆς διατετημένου Ἑλληνικῇ μαχαίρῃ γεύσεται.

⁵ Holtzendorff, *Handbuch* . . . vol. i. § 45.

included, from the point of view of any particular State, not only 'barbarians,' that is non-Hellenes, but also Greeks of other cities who had obtained a domicile in that State, and, of course, Greek travellers or visitors whose stay was merely temporary. In the classic epoch of Greece, the racial distinction between Hellenes and barbarians was not emphasized as strongly as it was in the heroic age; the distinction came to rest more on the claim to superior moral and intellectual capacity. In a striking passage, Isocrates said: "So far has Athens left the rest of mankind behind in thought and expression that her pupils have become the teachers of the world, and she has made the name of Hellas distinctive no longer of race but of intellect, and the title of Hellene a badge of education rather than of common descent."¹

Exigencies of commerce.

Effect of war in breaking down barriers.

Exaggerated statement as to attitude to aliens.

Wrong methods on the part of writers.

In practice this narrow exclusiveness was constantly being broken down, on the one hand by the exigencies of commerce which, as Montesquieu says, necessarily remedies destructive prejudices, "guérit des préjugés destructeurs,"² and on the other by war with its subsequent peaceful adjustments and alliances, which so much promoted international relationships and ameliorated the condition of the foreigners of the respective States.

Wheaton's observation, that "nothing but some positive compact exempted the persons of aliens from being doomed to slavery the moment they passed the bounds of one State and touched the confines of another"³ conveys an entirely erroneous impression. There is a tendency in some writers (especially such as are given to glorify the present civilization to the extreme disadvan-

¹ τοσοῦτον δ' ἀπολέλοιπεν ἡ πόλις ἡμῶν περὶ τὸ φρονεῖν καὶ λέγειν τοὺς ἄλλους ἀνθρώπους, ὥσθ' οἱ ταύτης μαθηταὶ τῶν ἄλλων διδάσκαλοι γεγόνασιν, καὶ τὸ τῶν Ἑλλήνων ὄνομα πεποιήκε μηκέτι τοῦ γένους, ἀλλὰ τῆς διανοίας δοκεῖν εἶναι, καὶ μᾶλλον Ἑλλήνας καλεῖσθαι τοὺς τῆς παιδείας τῆς ἡμετέρας ἢ τοὺς τῆς κοινῆς φύσεως μετέχοντας (*Panegyric*. 50).

² *Esprit des lois*, liv. xx. chap. i.

³ H. Wheaton, *History of the Law of Nations* (New York, 1845), p. 1.

tage of the ancient), who have not sufficiently investigated their subject, to regard this or that exceptional case, particularly so if it happens to be a prominent one, as representative of the usual prevailing conditions; and there is a still more injurious tendency in others who have not even superficially examined many issues relevant to their subject to embrace such views blindly and unreservedly. The fame of Greek and Roman international law has suffered from both these tendencies. A consideration of the institutions relating to aliens and of the various rights and privileges extended to them, as evidenced by the incontestable original sources (of which extant inscriptions are of the greatest importance) will at once dispel such erroneous conclusions.

Achilles said that Atreides treated him arrogantly among the Argives as though he were some 'worthless sojourner'—ὥσεί τιν' ἀτίμητον μετανάστην;¹ but this expression does not prove that the law authorized violence to the stranger. At most it indicates that he did not receive the same consideration as the citizen.

Some writers, again, have inferred from the word ἐχθρός (enemy) that foreigners were assimilated to enemies. But such argument is based on what is most probably, if not indubitably, a false etymology. The word is cognate with ἐκτός (outside),—οἱ ἐκτός being used by Plato with the meaning of strangers;² and in certain Locrian and Epidaurian inscriptions the forms ἐχθός and ἐχθοί are found for ἐκτός. Similarly, from a passage in Herodotus,³ who says the Spartans called strangers barbarians,⁴ ξεινοῦς, it is often concluded that foreigners were of necessity identified with enemies. This is a strangely distorted syllogism, and is still more untenable when applied to the Greeks in general. Indeed, on the contrary, does not the fact that ξείνος

Fallacious conclusions.

Aliens were not assimilated to enemies.

Wrong inference from the word ἐχθρός.

¹ *Iliad*, ix. 648; cf. xvi. 59.

² *Laws*, 629 D.

³ ix. 11. 55.

⁴ On the meaning of 'barbarian,' βάρβαρος, see F. Roth, *Ueber Sinn und Gebrauch des Wortes Barbar* (Nürnberg, 1814).

means at the same time a guest-friend, under the protection of Ζεὺς ξένιος, and a stranger, an alien refugee, clearly point to a conception which is the very antithesis to notions of hostility?

The Greeks not
averse from
foreigners.

Hospitality.

Athens offered
the greatest
freedom to
aliens.

Different
practices in the
Greek States.

In Crete.

Sparta.
Argos.

In point of fact the Greeks liked foreigners, and they were themselves fond of travelling abroad. Hospitality was practised not only through the influence of the religious traditions of the race, but also with a view to commercial advantages. Herodotus states there were even certain ties of hospitality between such sovereigns as Polycrates, the tyrant of Samos, and Amasis, king of Egypt.¹

The extent of the privileges of access varied, of course, in different States. Athens extended the greatest liberty, Sparta the least; and the policy of these two cities indicates the attitude generally of the democratic, commercial States on the one hand, and that of the aristocratic, agricultural States on the other. The Doric States were most anxious to safeguard themselves against alien influences. Thus Epidamnus appointed a special officer, πωλήτης² (literally 'seller') to regulate, on behalf of his fellow-countrymen, all commercial transactions with the neighbouring Illyrian barbarians. The Cretan cities also imposed certain restrictions,³ but they were not so rigorous as those of the Spartans. In the earlier history of Sparta her citizens were forbidden to go abroad,⁴ as was also the case in Argos,⁵ and foreigners were not allowed

¹ Herodot. iii. 39.

² Plut. *Quaest. Gr.* 29.—This is not to be confused with the Athenian πωληταί, ten officers who, like the Roman censors, let out (*locabant*) the taxes and other revenues to the highest bidders, and sold confiscated property.

³ Cf. G. F. Schoemann, *Griechische Alterthümer*. Vierte Auflage.—Neu bearbeitet von J. H. Lipsius, 2 Bde. (Berlin, 1897-1902)—vol. i. p. 385.

⁴ Plut. *Instit. Lac.* 19; cf. Plato, *Protag.* 342 D.

⁵ Cf. Ovid, *Metam.* xv. 29:

“... prohibent discedere leges,
Poenaque mors posita est patriam mutare volenti.”

to reside within her precincts,¹—a policy which found many admirers in the conservative parties of other States.² The Athenian citizens, on the contrary, were permitted to emigrate, and take their possessions with them,— . . . τῶ . . . Ἀθηναίων τῶ βουλομένῳ . . . ἐξεῖναι λαβόντα τὰ αὐτοῦ ἀπιέναι ὅποι ἂν βούληται.³ Herodotus reports that in his time Sparta had conferred citizenship on only one individual, and that even then the sanction of the oracle had to be obtained.⁴ The aim of the Lacedaemonians was to preserve the purity of their religion, and the valour, simplicity and frugality of their national character.⁵ Thus Archilochus of Paros, a lyric poet greatly esteemed by the ancients, was expelled from Sparta the same hour of his arrival for having said that it was better to flee than die on the battlefield ; a tyrant was expelled for distributing gold and silver vessels amongst the citizens ; likewise a sophist for claiming he could discourse for a whole day on any subject whatever ; and a cook for corrupting their simple taste.⁶

Aristophanes refers, on more than one occasion, to the unsociable spirit of the Lacedaemonians ;⁷ and they also incurred, on account of their *ξενηλασία* (alien acts), the hatred of many other Greek nations. But many exceptions were made even at the most rigorous epoch. Lycurgus himself made use of the poet and musician Thales, a native of Gortyna in Crete, who came to appease the wrath of Apollo ; Terpander, the father of Greek music and of lyric poetry, a native of Antissa in Lesbos, was welcomed ; and so was Pherecydes, an early

¹ Xenoph. *Resp. Laced.* xiv. 4 ; cf. Plut. *Ages.* 10 ; *Lycurg.* 27 ; Thuc. i. 144.

² Cf. Arist. *Polit.* vii. 5. 3 ; Plato, *Laws*, viii. 849.

³ Plat. *Crito*, 51 D.

⁴ Herodot. ix. 33-35.—See *infra*, p. 181, as to naturalization in Sparta.

⁵ Plut. *Ages.* 10.

⁶ Cf. Nauze, *Mémoire sur la Xénélasie* (in *Mémoires de l'Académie des Inscriptions*, t. xii. pp. 159-176).

⁷ *Aves*, 1013 *seq.* ; *Pax*, 623.

Greek philosopher of Syros, an island in the Aegean. Tyrtaeus, the Athenian elegiac poet, whose war-songs stimulated the Spartans in the second Messenian war, received citizenship.¹ Foreign physicians and soothsayers were admitted.² During the celebration of the public games foreigners were allowed access to the territory. *Proxenia*³ was established; and many citizens obtained hospitality abroad.⁴ In the time of Xenophon the barriers between Spartans and foreigners were still further removed. Discussing the government of Lacedaemon and her departure from the discipline of Lycurgus, he says, as an ardent admirer of the earlier constitution: "I know that for this reason [*i.e.* degeneration through contact with foreigners and possible imitation of ostentation in wealth, etc.] strangers were formerly banished from Sparta, and that citizens were not allowed to reside abroad, lest they should be initiated in licentiousness by foreigners; but now I know that those who are thought the leading men among them have shown the utmost eagerness to be constantly engaged in governing some foreign city."⁵

Restrictions
gradually
removed in
Greece in
general.

In other parts of the Hellenic world the earlier strictures against strangers were more and more mitigated. Crito tried to induce Socrates to escape from prison, and assured him that he would be loved wherever he might go, and not in Athens only, that in Thessaly he had

¹ Nauze, *loc cit.* pp. 162 *seq.*

² *Ibid.* pp. 169 *seq.*

³ On this institution see *infra*, pp. 147 *seq.*

⁴ Cf. G. F. Schoemann, *Antiquitates juris publici Graecorum* (Gryphiswaldiae, 1838), p. 142.

⁵ *Resp. Laced.* xiv. 4: Ἐπίσταμαι δὲ καὶ πρόσθεν τούτου ἕνεκα ξενηλασίας γιγνομένης καὶ ἀποδημείν οὐκ ἔξόν, ὅπως μὴ ῥαδιουργίας οἱ πολῖται ἀπὸ τῶν ξένων ἐμπίπλαιντο· νῦν δ' ἐπίσταμαι τοὺς δοκοῦντας πρῶτους εἶναι ἑσπουδακότας ὥς μηδέποτε παύονται ἀρμόζοντες ἐπὶ ξένης. (There appears to be some controversy as to the genuineness or proper place of this chapter;—but that need not concern us here.) Cf. the frequent denunciations of Italianized Englishmen, in the Elizabethan epoch, through their assumption of foreign airs and use of foreign language.

friends who would value and protect him, and that no Thessalian would in any way molest him.¹

In most of the Greek States, but in Athens above all, strangers received protection and large concessions. Not only were the persons and property of free foreigners safeguarded, but even prisoners of war who had been ransomed (*δορυξενος*) were afforded faithful protection. General hospitality (not to be confused with *proxenia*, which will be considered shortly) assumed the character of a public institution. In the heroic age the tie of hospitality contracted between stranger and host was held to be a sacred bond, and was transmitted from father to son.² This institution played an important part also in historic times; for example, Alcibiades, as Thucydides relates, was the intimate and hereditary friend of Endius, one of the ephors, and on account of this bond his family adopted a Lacedaemonian name.³ Homer often says that strangers and the poor came from Zeus,⁴ that suppliants were under his special protection.⁵ When Ulysses, as an unknown wrecked man, came to Alcinous, the latter said that anyone with even a moderate share of right feeling is fully aware that it is his duty to treat a guest and a suppliant just as though he were his own brother :

ἀντὶ κασιγνήτου ξείνός θ' ἰκέτης τε τέτυκται
ἀνέρι, ὅς τ' ὀλίγον περ ἐπιψαύῃ πραπίδεσσι.⁶

Only the Cyclopes and the Laestrygonians attack

¹ Plato, *Crito*, 45 c : εἰσὶν ἐμοὶ ἐκεῖ ξένοι, οἳ σε περὶ πολλοῦ ποιήσονται καὶ ἀσφάλειάν σοι παρέχονται, ὥστε σε μηδὲνα λυπεῖν.

² *Iliad*, vi. 119-236; *Odys.* i. 187; xv. 197; and see G. F. Tomasini, *De tesseriis hospitalitatis* (Amstelodami Frisii, 1670), esp. chap. xxiii. pp. 159-164.

³ Thuc. viii. 6. 4 : . . . ξυνέπρασσε γὰρ αὐτοῖς καὶ Ἀλκιβιάδης, Ἐνδῖψ ἐφορεύοντι πατρικὸς ἐς τὰ μάλιστα ξένος ὢν, ὅθεν καὶ τοῦνομα Λακονικὸν ἢ οἰκία αὐτῶν κατὰ τὴν ξενίαν ἔσχεν.

⁴ *Odys.* vi. 207 seq.; xiv. 508.

⁵ *Odys.* vii. 165, 181; ix. 270.

⁶ *Odys.* viii. 546.

foreigners. Not only do princes offer shelter to travellers, but a poor swineherd like Eumaeus gladly offers a beggar food and a lodging. "Stranger, though still a poorer man should come here it would not be right for me to insult him, for all strangers and beggars are from Jove."

ξείν', οὐ μοι θέμις ἔσθ' οὐδ' εἰ κακίων σέθεν ἔλθοι,
ξείνον ἀτιμάσσαι· πρὸς γὰρ Διὸς εἰσιν ἅπαντες
ξείνοί τε πτωχοί τε.¹

Consideration
shown to
strangers.

Amongst the Lucanians there was a law which imposed a fine on any citizen who refused to receive a foreigner asking for shelter after sunset.² Charondas urged his citizens to fulfil the obligation of hospitality as being of a sacred character.³ And of Crete, conservative as it was, it is reported by a later Greek writer that at the common meals two tables were reserved for strangers, who were served before the magistrates themselves.⁴ Anyone who refused to show strayed travellers the way was liable to public imprecations.⁵ In Theocritus⁶ this duty is enjoined in the name of Hermes Ἑνόδιος.⁷

Passports.

The practice of conceding passports was also known in Greece. There was the *σφραγίς* (so called because of the official seal), which was really a form of contract, *συγγραφή*. Sometimes passports were termed

¹ *Odys.* xiv. 55 *seq.*

² Aelianus, *Variae historiae*, iv. 1.

³ Stobaeus, *Florilegium*, xlv. 40 : Μεμνημένους Διὸς ξενίου ὡς παρὰ πᾶσιν ἱδυμένου κοινού θεοῦ, καὶ ὄντος ἐπισκόπου φιλοξενίας τε καὶ κακοξενίας.

⁴ Athen. *Deip.* iv. 22 ; cf. Sainte-Croix, *Législation de la Crète*, pp. 396-8.

⁵ Cic. *De offic.* iii. 13.

⁶ *Idyll.* xxv. 3-6 :

ἔκ τοι, ξείνε, πρόφρων μυθήσομαι ὅσσ' ἐρεείνεις,
Ἑρμῆω ἄζόμενος δεινὴν ὅπιν εἰνοδίοιο·
τὸν γὰρ φασὶ μέγιστον ἐπουρανίων κεχολῶσθαι
εἰ κεν ὁδοῦ λαχρεῖον ἀνήνηταί τις ὁδίτην.

⁷ From ὁδός, road, highway. An epithet of certain gods who had their statues by the way-side or at cross-roads.

σύμβολα, a designation which applied in general to all marks or signs of legalization.¹ The distinction, however, between the two terms is not very clear. Probably σφραγίς applied to a sealed passport granted to a person, whereas the σύμβολον was frequently (especially as used by Aristophanes) an official label for goods to indicate that they were free from contraband. These passports were necessary for foreign travellers only when the town, which was their destination, was engaged in war. It was naturally indispensable in such cases to exercise greater care and superintendence not only with regard to those coming into the town but also with regard to those leaving it. Sometimes such passports were also employed in time of peace to ensure greater safety.

Difference
between
σφραγίς
and
σύμβολον.

There were numerous establishments in Greece in which foreigners could obtain food and shelter. There were hostels of various kinds; we hear of the πανδοκεία (inns), the καταγώγια (halting-places), the καταλύματα (lodgings, guest-chambers), the καταλύσεις (resting-places), and the like.

Numerous
hostelries.

In the *Laws* Plato laid down that arbitrary offences committed against strangers were liable to the vengeance of the gods, that the foreigner having no kindred and friends is all the more an object of sympathy both of gods and men. The greatest of such offences are those committed against suppliants.²

Wrong to
strangers
subject to
divine
vengeance.

Athens frequently boasted that of all States she conferred the largest measure of privileges and evinced the greatest liberality to foreigners. In this respect the Athenian foreign policy offers a striking contrast to the Spartan. Solon, unlike Lycurgus the Lacedaemonian

Freedom
granted by
Athens.

Difference
between
Athenian and
Spartan policy.

¹ Plautus, *Capituli*, ii. 3. 90 (447); Aristoph. *Aves*, 1213 *seq.*

² v. 729 ε: σχεδὸν γὰρ πάντ' ἐστὶ τὰ τῶν ξένων καὶ εἰς τοὺς ξένους ἀμαρτήματα παρὰ τὰ τῶν πολιτῶν εἰς θεὸν ἀνηρητημένα τιμωρὸν μᾶλλον· ἔρημος γὰρ ὢν ὁ ξένος ἐταίρων τε καὶ ξυγγενῶν ἐλεινότερος ἀνθρώποις καὶ θεοῖς. . . .

730 α: ξενικῶν δ' αὖ καὶ ἐπιχωρίων ἀμαρτημάτων τὸ περὶ τοὺς ἱκέτας μέγιστον γίγνεται ἀμάρτημα ἐκάστοις.

lawgiver, encouraged commercial intercourse and navigation and welcomed foreign merchants. It was the proud boast of Pericles, in his famous oration on the occasion of the public funeral at Athens of the citizens who had fallen in the war (B.C. 431) that his city was thrown open to the world, that the Athenians never expelled a foreigner or prevented him from observing or learning anything the secret of which if revealed to an enemy might be profitable to him.

Τὴν τε γὰρ πόλιν κοινὴν παρέχομεν, καὶ οὐκ ἔστιν ὅτε ξηνηλασίαις ἀπείργομέν τινα ἢ μαθήματος ἢ θεάματος, ὃ μὴ κρυφθὲν ἂν τις τῶν πολεμίων ἰδὼν ὠφελῇται. . . .¹

Sophocles² refers to the right of hospitality. Euripides terms Athens the 'hospitable port'—*λιμένα τὸν εὐχυνότατον ναύταις*³—and says she is ever ready to aid the unfortunate;⁴ and similarly Xenophon claims that she is always disposed to extend a helping hand to those who appeal to her as victims of injustice⁵—*πάντας καὶ τοὺς ἀδικουμένους καὶ τοὺς φοβουμένους ἐνθάδε καταφεύγοντας ἐπικουρίας ἤκουον τυγχάνειν*.

Athens a place
of refuge in
intestine
conflicts.

During the intestine conflicts in the Greek States, everybody could find in Athens a place of refuge.⁶ Diodorus speaks of the right of asylum and of the generous laws in favour of suppliants.⁷ It was the constant policy of Athens, says Demosthenes, to deliver the oppressed⁸—*τοὺς ἀδικουμένους σώζειν*—and to take the part of the unfortunate.⁹ Indeed, she practised this policy to such an extent that she was often reproached for allying herself with the feeble.¹⁰ The Athenians deified pity. "If I recommend mercy to a judge," argued Quintilian, "will it not support my application to observe that the eminently wise nation of the Athenians regarded mercy not as a mere affection

Pity deified.

¹ Thuc. ii. 39.

² *Oedip. Col.* 562-568.

³ *Hippol.* 157.

⁴ *Heraclid.* 329 seq.

⁵ Xenoph. *Hellen.* vi. 5. 45.

⁶ Thuc. i. 2.

⁷ xiii. 26.

⁸ *Pro Megalop.* 14 seq.

⁹ Demosth. *Pro Rhod.* 22; *De Cherson.* 41.

¹⁰ Isocrat. *Panegy.* 53.

of the mind but as a deity?"¹ "In the market-place of Athens . . . there is an altar to Mercy, to whom, though he is of all gods the most helpful in human life and in the vicissitudes of fortune, the Athenians are the only Greeks who pay honour."² When under the Roman empire it was proposed to the Athenians to adopt gladiatorial shows, Demonax, a philosopher, strongly protested. "First of all," cried he, "pull down the altar which our fathers have raised to Mercy."³ Plutarch relates also that the Athenians were considerate to animals.⁴ Even in the time of Plutarch Athens gained the esteem and admiration of other peoples for her conspicuous examples of kindness and humanity;⁵ later, Lucian (a native of Syria) commended the Athenians' humane conduct towards their guests;⁶ and the Roman Emperor Julian added the same testimony.⁷

¹ *Inst. orat.* v. 11. 38: "Aut si misericordiam commendabo iudici, nihil proderit, quod prudentissima civitas Atheniensium non eam pro affectu sed pro numine accepit?"

² Ἀθηναίοις δὲ ἐν τῇ ἀγορᾷ . . . Ἐλέου βωμός, ἧ, μάλιστα θεῶν ἐς ἀνθρώπινον βίον καὶ μεταβολὰς πραγμάτων ὄντι ὠφελίμῳ, μόνοι τιμὰς Ἑλλήνων νέμουσιν Ἀθηναῖοι.—Cf. Apollod. *Bibl.* ii. 8, with the note of Heyne.

³ Lucian, *Demon.* 57.

⁴ *Cat. Maj.* 5; *De solert. anim.* 13; Cf. Aelian. *De natur. anim.* vi. 49.—Cf. the note by W. H. S. Jones, *The Attitude of the Greeks towards Animals* (in *Classical Review*, London, 1908, vol. xxiii. pp. 209-210).

⁵ Plut. *Aristid.* 27.

⁶ *Scythia.* 10.

⁷ *Misopogon.* in *Opera*, ed. Spanheim, p. 348 c.

CHAPTER VI

GREECE AND FOREIGNERS.—DIFFERENT CLASSES AND PRIVILEGES.—RUDIMENTS OF A CONSULAR SYSTEM (*PROXENIA*)

Admission of
strangers—by
special
authorization.

THE admission of strangers was in practice usually permitted by special authorization, though in Athens there were no particular provisions in her public law to that effect. As has been already mentioned, passports¹ were readily granted to travellers, and to foreigners intending to stay in the country temporarily.

Foreigners
enjoyed
freedom of
speech.

They enjoyed freedom of speech and were at liberty to move about where they pleased except, of course, in such places as were exclusively reserved for citizens for the purpose of performing their sacred rites. Demosthenes, protesting against the restrictions that appear to have been imposed at certain times on the free expression of opinion in the Athenian Councils, exclaims: "You hold liberty of speech in other matters to be the general right of all residents in Athens, insomuch that you allow a measure of it to foreigners and slaves."²

Taxes in case
they engaged
in Athenian
commerce.

In case they should engage in commercial transactions of any kind in Athens, special taxes were imposed. There was a law of Solon to this effect: οὐκ ἔξεστι ξένην ἐν

¹ τὸν ἀποδημοῦντα δεῖ σύμβολον ἔχειν ἐπὶ τῷ συγχωρηθῆναι παρελθεῖν.—Σφραγίδα ἢ σύμβολον δεῖ ἔχειν τὸν ξένον, ἐπὶ τῷ συγχωρηθῆναι παρελθεῖν (Schol. ad Aristoph. *Λυσ.*, 1213, 1214). Cf. *Corpus juris Attici*, 25, 1247.

² c. *Philipp.* iii. 3: ὑμεῖς τὴν παρῳήσιαν ἐπὶ μὲν τῶν ἄλλων οὕτω κοινὴν οἴεσθε δεῖν εἶναι πᾶσι τοῖς ἐν τῇ πόλει, ὥστε καὶ τοῖς ξένοις καὶ τοῖς δούλοις αὐτῆς μεταδεῶκατε. . . .

τῇ ἀγορᾷ ἐργάζεσθαι, εἰ μὴ ξενικὰ τελεῖ.¹ Certain restric-
 tive measures were applied to their trading, not through
 ill-feeling or racial antagonism, but solely on the grounds
 of public economy. For example, the free exportation
 of certain commodities, and principally olive oil,² was
 prohibited; and they were also forbidden to lend money
 on ships which did not bring corn to Athens,—a provision
 which applied, however, as much to Athenians as to
 non-citizens.

Certain
 restrictions on
 their trading.

Demosthenes addressing the Athenian jury reminds
 them of the severity of the law in respect of such delin-
 quencies³—ἴστε γὰρ δὴπου . . . τὸν νόμον ὡς χυλεπὸς ἐστίν,
 εἴαν τις Ἀθηναίων ἀλλοσέ ποι σιτηγίῃ ἢ Ἀθήναζε, ἢ χρήματα
 δανείσῃ εἰς ἄλλο τι ἐμπόριον ἢ τὸ Ἀθηναίων (“For, of course,
 you know, men of the jury, how severe the law is if any
 Athenian convey corn to any place other than Athens,
 or lend money to any port other than the Athenian”).
 Then he proceeds to recite the enactment relating to the
 question: “It shall not be lawful for any Athenian, or
 any stranger domiciled in Athens, or any person under
 their control, to lend out money on a ship which is not
 commissioned to bring corn to Athens, or anything else
 which is specifically mentioned”;⁴ and afterwards he
 refers to the necessary legal proceedings and the penalty
 involved, including a forfeiture of the lender’s right of
 action.

But restrictions
 also on
 Athenians.

To compensate for such restrictions, few as they were,
 there were some instances of exemption from taxes, as,
 for example, in the case of fishermen and sellers of eels,
 and dyers and importers of purple. The foreigners not

Certain
 exemptions
 from imposts.

¹ Given in *Corp. jur. Att.* 874.

² *Corp. jur. Att.* 1546: τῶν γινομένων διάθεσιν πρὸς ξένους ἐλαίου
 μόνον εἶναι, ἄλλα δ’ ἐξάγειν μὴ ἔστω.—See the note to this article
 and compare Schol. ad Pindar, *Nem. Od.* x. 64: οὐκ ἔστι δὲ ἐξαγωγή
 ἐλαίου ἐξ Ἀθηναίων εἰ μὴ τοῖς νικῶσι.

³ *c. Lacrit.* 51.

⁴ *Ibid.*: Ἀργύριον δὲ μὴ ἐξεῖναι ἐκδοῦναι Ἀθηναίων καὶ τῶν
 μετοίκων τῶν Ἀθήνησι μετοικούντων μηδενί, μηδὲ ὧν οὔτοι κύριοί
 εἰσιν, εἰς ναῦν ἥτις ἂν μὴ μέλλῃ ἄξειν σίτον Ἀθήναζε καὶ τὰλλα
 τὰ γεγραμμένα περὶ ἐκάστου αὐτῶν.

Foreign
influence in
Athens.

only promoted the external commerce of Athens, but brought with them various industries, and also largely worked in the mines. Xenophon, speaking of the Athenian revenues derived from the silver mines and of the probable continuance of their output, says the State seemed to have recognized this, for it permitted any foreigner to work in the mines on paying the same duty as was paid by citizens.¹ To such an extent was the activity of foreigners manifested in Athens, so considerable was their number, and so marked their influences that the city presented an international aspect. In their daily lives the Athenians adopted various words, customs, and fashions from the different kinds of languages they heard, and from the different modes of living they observed.²

False
inferences
from
occasional
remarks by
ancient writers.

It is not to be inferred from certain occasional observations, found in the ancient writers, of a character seemingly hostile to foreigners that their position was really precarious, and that the national tolerance of them was only ostensible. For example, Demosthenes is said to have made the remark, which is reported by Aeschines,³ that he preferred the salt of the city to that of the guest's table—*τοὺς τῆς πόλεως ἅλας περὶ πλείονος ποιήσασθαι τῆς ξενικῆς τραπέζης*. One may, no doubt, justifiably conclude from statements of this description that there was and always remained with the Greeks—as is obviously the case with the so-called more enlightened modern nations—a certain innate hostility to foreigners, a certain subconscious aversion. But, on the other hand, one cannot legitimately infer that aliens were not granted any substantial rights at all, and that they were beyond the

¹ *De vectig.* iv. 12: Δοκεῖ δὲ μοι καὶ πόλις προτέρα ἐμοῦ ταῦτα ἐγνωκῆναι. Παρέχει γοῦν ἐπὶ ἰσοτελείᾳ καὶ τῶν ξένων τῷ βουλομένῳ ἐργάζεσθαι ἐν τοῖς μετάλλοις.

² Xenoph. *Resp. Athen.* ii. 8: Ἐπειτα φωνὴν πᾶσαν ἀκούοντες ἐξελέξαντο τοῦτο μὲν ἐκ τῆς τοῦτο δὲ ἐκ τῆς. καὶ οἱ μὲν Ἕλληνες ἰδίᾳ μᾶλλον καὶ φωνῇ καὶ διαίτῃ καὶ σχήματι χρώνται, Ἀθηναῖοι δὲ κεκραμένῃ ἐξ ἀπάντων τῶν Ἑλλήνων καὶ βαρβάρων.

³ *c. Ctesiph.* 224.

protection of the law. Absolute exclusion from and prohibition of commerce in the national ports and markets applied only to enemies ; and foreigners (notwithstanding the careless verbal twistings of a good many modern writers) were *not* necessarily enemies.¹

To obtain greater security for foreigners, in the sense of explicit recognition by the State, and to render their position more precise and their rights more clearly defined, international conventions (σύμβολα) were entered into. Andocides refers to such a convention and to its violation by Alcibiades who had imprisoned one Agatharcus, a painter, in his house to compel him to execute certain work. "But in our conventions with the other cities we agree that it is forbidden to arrest or imprison a free man, and we have imposed a large fine for any infringement of this undertaking."² Sometimes it was also stipulated that punishment should be inflicted for the commission of offences in the territory against the sovereigns of other States.³ These σύμβολα regulated the procedure for the trial of actions (δίκαι ἀπὸ συμβόλων),⁴ brought by the individual subjects of different States against one another, or by an individual against a foreign State, or by a foreign State against an individual subject. Usually the tribunal of the defendant's country —the *forum rei* of Roman jurisprudence—exercised jurisdiction over such suits ; but in some instances Athens adopted the *forum contractus*. In any case we find many examples where such court was only a court of first instance, from which the plaintiff could appeal to the tribunal of his own or of the defendant's city, as the case

Conventions
to secure rights
to foreigners.

Settlement of
commercial
actions.

¹ See *infra*, as to commerce during war.

² Andocid. c. *Alcibiad.* 18 : καὶ πρὸς μὲν τὰς ἄλλας πόλεις ἐν τοῖς συμβόλοις συντιθέμεθα μὴ ἐξέρχαι μήθ' εἶρξαι, μήτε δῆσαι τὸν ἐλεύθερον. ἐὰν δέ τις παραβῇ, μεγάλην ζημίαν ἐπὶ τούτοις ἔθεμεν.

³ Cf. A. E. Egger, *Études historiques sur les traités publics chez les Grecs et les Romains* (Paris, 1866), p. 90.

⁴ See M. H. E. Meier and G. F. Schoemann, *Der attische Process*. Neu bearbeitet von J. H. Lipsius (Berlin, 1883-7), pp. 994 *seq.* See further, *infra*, the second part of chap. viii.

may be, or even, sometimes, by previous or express arrangement, to the arbitration of a third city. Such city was called πόλις ἑκκλητος (literally, a city 'called out' or chosen to decide a certain matter in dispute), and the trial itself δίκη ἑκκλητος.¹

The
σύμβολα
and conflicts
of laws.

Commercial treaties in the strict modern sense were practically unknown.² But, at least, the σύμβολα not only assured to the respective subjects of the States in question personal liberty and unmolested possession of their property in each other's territory, and provided for due punishment in case of any violation of these rights; they also based the juridical solution of possible conflicts on equitable principles. The provisions were not, of course, everywhere the same; they varied in accordance with the customs and practices of the contracting States. And, no doubt, the principles adopted in these conventions were modified according to the municipal law or special legislation of each State; and the procedure varied in like manner.³

Where no
convention—
measures of
reprisal.

Should a contract be violated, when no such commercial convention existed between two States, and when satisfaction was refused in any other way not expressly provided for by contractual stipulation, the party wronged was entitled to avail himself of measures of

¹ As to πόλις ἑκκλητος, see *infra*, p. 206, and chap. xx. on Greek arbitration.

² Cf. A. B. Büchsenenschütz, *Besitz und Erwerb im griechischen Alterthume* (Halle, 1869), pp. 516 *seq.*: "Es scheint allerdings, als ob es gewisse, allgemein anerkannte Bestimmungen gegeben hätte, durch welche die Freiheit des gegenseitigen Verkehrs zwischen den Angehörigen der einzelnen Staaten garantiert war, da die Megarer, als sie von dem Besuche des athenischen Marktes ausgeschlossen worden waren, sich beklagten, dass dies gegen das allgemeine Recht und die von den Hellenen beschworenen Festsetzungen geschähe, aber weiteres ist über die Sache nicht bekannt." In reference to the complaints of the citizens of Megara on their having been excluded from the Athenian markets, cf. Plut. *Pericles*, 29: Μεγαρεῖς αἰτιώμενοι πάσης μὲν ἀγορᾶς πάντων δὲ λιμένων, ὧν Ἀθηναῖοι κρατοῦσιν, εἰργεσθαι καὶ ἀπελαύνεσθαι παρὰ τὰ κοινὰ δίκαια καὶ τοὺς γεγενημένους ὅρκους τοῖς Ἑλλήσιν.

³ See further the latter part of chap. viii. as to the question of aliens and jurisdiction.

reprisal—*σύλαι* or *σύλα*. This involved strictly a seizure of the defaulting party's goods only, as opposed to the proceeding of *ἀνδροληψία*, which permitted, under certain circumstances, the seizure of his person. Such goods constituted a *ρύσιον*, or pledge, by means of which satisfaction for the wrong could be obtained, if the verdict eventually went against the said defaulter.¹

Apart from these specific *σύμβολα* there was occasionally an interchange by two (and sometimes more) States of certain civic rights, an arrangement effected also by means of treaties. Such practices were promoted by the conception of, at all events, a certain rudimentary international comity, which was fostered by close political and commercial relationships. A mutual exchange of the private rights of citizenship established the relationship of isopolity (*ισοπολιτεία*), and carried with it *ἐπιγαμία*, the right of intermarriage (corresponding to the *ius connubii* of the Roman law), and the right to hold land and houses—*γῆς καὶ οἰκίας ἐγκτησις*—in each other's dominions. Xenophon remarks that it was, indeed, a great privilege to be allowed to acquire houses, etc., in the city.² On many occasions, it is to be observed, isopolity was established not mutually but simply on a unilateral basis.

Interchange of civic rights—Isopolity. ✓

To proceed to the exercise of these privileges usually involved a renunciation of former citizenship.³ In this connection it may be mentioned that there was a law of Athens forbidding citizens to cultivate land outside Attica. *Οἱ Ἀθηναῖοι . . . νόμον ἔθεντο μηδένα τῶν Ἀθηναίων γεώργειν ἐκτὸς τῆς Ἀττικῆς.*⁴

Renunciation of native citizenship, if that of another State accepted.

Niebuhr⁵ believes that isopolity did not include political rights, but the extant texts of the conventions

Isopolity and political rights.

¹ See *infra*, chap. xxvii., on reprisals and *androlepsia*.

² *De vectig.* ii. 6.

³ Cf. Egger, *op. cit.* p. 86.

⁴ Diod. Sic. xv. 29: and see *Corp. jur. Att.* 1295.

⁵ B. G. Niebuhr, *Römische Geschichte*, 3 Bde. (Berlin, 1873-4); vol. ii. note 101.

relating to it are couched in the most general terms, and speak of the participation in all things divine and human.¹ Such a comprehensive concession undoubtedly included some rights of a political character.

Several Greek writers after the third century, for example, Dionysius, Strabo, Diodorus, Josephus, and Appian, use the word *ισοπολιτεία* as the equivalent of full citizenship. Before then it was not employed in that sense, *πολιτεία* having been used instead.

Some decrees state that it was granted to citizens of another town *en masse*; others show it to have been conferred on individuals as a reward for rendering good services, or for otherwise evincing a friendly disposition.

Isopolitic
treaties.

There were various isopolitic treaties between Cretan towns.² But the scope and application of such treaties were naturally different from those between more powerful communities. The alliance between Athens and Rhodes³ belongs to the epoch of Greek decadence, as Laurent says.⁴ Though the principle of perfect equality was scarcely ever, if at any time, at all applied, yet these arrangements had, whatever scope they possessed, certain beneficial results. They were especially conducive to the evolution of the idea of international comity, of a *civitas gentium*, and played an important part in the formation of Roman unity. "Cependant l'idée que l'isopolitie renfermait ne resta pas stérile; elle produisit ses fruits sur un sol plus favorable. Nous trouverons les conventions isopolitiques chez les Romains, nous en verrons naître les municipes qui ont joué un rôle considérable dans la formation de l'unité romaine."⁵

Influence of
isopolitic
grants.

¹ Compare *Corp. inscrip. Graec.* t. i. nos. 2254. 26; 2256. 13; 2257. 16.

² See *Corp. inscrip. Graec.* t. ii. nos. 2554, 2556, 2557; cf. Sainte-Croix, *Législation de Crète*, pp. 357-360.

³ Polyb. xvi. 26; Livy, xxxi. 15.

⁴ *Histoire du droit des gens* . . ., vol. ii. p. 115.

⁵ Laurent, *ibid.*

Isopolity was sometimes given specifically and alone ; though generally it was comprised in a more general treaty, either of *ἀσυλία*¹ (inviolability of person and property in the stricter sense) ; or of simple alliance for defensive purposes—*ἐπιμαχία*, as between Hierapytna of Crete and Magnesia,² when the word *ἰσοπολιτεία* is replaced by the expressions, indicating the regular constituent rights, *ἀτέλεια*, immunity from certain public burdens, *ἐπιγαμία*, right of intermarriage, *ἐγκτησις*, capacity to hold real property, *προεδρία*, right to occupy front seats at public games, etc.,—in a word, participation in all civil and religious affairs, *μετοχή θείων καὶ ἀνθρωπίνων* ;³ and as between Pergamum and Temnos, where there is express mention of the right of reciprocal suffrage in the assemblies of the people,—which is a clear refutation of Niebuhr's view mentioned above ; or, again, isopolity was sometimes included in a treaty establishing a symmarchy, *συμμαχία*, an alliance both offensive and defensive (as between the Cretan towns Lato and Olus,⁴ and between Hierapytna and Lyttos, etc.). Though the rights conferred were of so extensive a character, yet the two States concerned preserved their respective identity and independence.⁵

Isopolity often arranged for in general treaties.

Rights and privileges implied.

Apart from establishing isopolity by means of a treaty, certain rights, more or less comprehensive, were granted by decree as a recompense for services rendered to the State. Thus the memorable Byzantine decree conferred large privileges on the Athenians for having offered assistance especially in the struggles with Philip of

Isopolitic decrees distinguished from conventions.

¹ Cf. the treaty between Allaria of Crete and Paros, in *Corp. inscrip. Graec.* 2557.

² P. Cauer, *Delectus inscriptionum Graecarum* (Lipsiae, 1883), no. 118.

³ Cf. in the following paragraph the Byzantine decree in favour of the Athenians.

⁴ *Corp. inscrip. Graec.* no. 2554.

⁵ On isopolity, see C. V. Daremberg and E. Saglio (Ed.), *Dictionnaire des antiquités grecques et romaines* (Paris, 1884, etc.), s.v. *Isopoliteia*, pp. 180, 181. And on treaties and alliances generally, see *infra*, chaps. xvi. and xvii.

Macedon. "It is resolved by the people of Byzantium and Perinthus to grant unto the Athenians the right of intermarriage, citizenship, purchase of land and houses, the first seat at the games, first admission to the Council and People after the sacrifices, and exemption from all public services to such as wish to reside in the city." In the Greek text of the decree, as given by Demosthenes, will be found some of the terms considered above,—ἐπιγαμία, πολιτεία, ἔγκλησις, and προεδρία.¹ Besides these concessions, three statues were erected in their honour.

Hence, the isopolitic decrees were of a unilateral nature, whilst the isopolitic conventions established a reciprocity of civic rights.

Sympolity.

An enlargement of reciprocal isopolity is found in a rarer institution, συμπολιτεία, which is practically a federal union of States with interchange of full civic and probably full political rights. It did not imply a complete amalgamation of these States, in the sense of the whole obliterating the significance of the individual constituent members, for their respective civic and political independence was not necessarily impaired. It was merely a convention voluntarily established for the purpose of giving every subject of the States in question a double or treble citizenship, as the case may be, and was susceptible of dissolution at the pleasure of any of the allied communities. An example is found in the case where the people of Magnesia are made full citizens of Smyrna.²

Double or
treble
citizenship
possible.

Special
privileges and
exemptions.

Special privileges of lesser extent were also occa-

¹ Demosth. *De corona*, 91: δεδύχθαι τῷ δάμῳ τῷ Βυζαντίων καὶ Περινηθίων Ἀθηναίοις δόμεν ἐπιγαμίαν, πολιτείαν, ἔγκλησιν γὰρ καὶ οἰκίαν, προεδρίαν ἐν τοῖς ἀγῶσι, πόθοδον ποτὶ τὰν βωλὰν καὶ τὸν δάμον πρῶτοις μετὰ τὰ ἱερά, καὶ τοῖς κατοικεῖν ἐθέλουσι τὰν πόλιν ἀλειτουργήτοις ἡμεν πᾶσάν τὰν λειτουργίαν. . . . Cf. Xenoph. *Hellen.* i. 1. 26.

² E. L. Hicks and G. F. Hill, *A Manual of Greek Historical Inscriptions* (Oxford, 1901), no. 176, ll. 35 *seq.*—See *infra*, on examples of Greek treaties and alliances; and on naturalization in Greece, see chap. viii.

sionally conceded. Travellers were liable to be searched at the frontiers, to find whether they took out of the country or brought in prohibited goods, or such goods as were subject to customs duty. Now some foreigners were exempted from this liability, either because of their good offices to the State, or as a mark of honourable recognition for other reasons. An immunity of this nature was termed ἀτέλεια (which has ἀτέλεια. already been referred to), of which numerous instances are preserved in inscriptions.¹ Again in time of war certain enemy aliens were for the same reasons protected both in regard to their persons and their property; such guaranteed inviolability was termed ἀσυλία (as was before ἀσυλία. mentioned). Many inscriptions speak of such inviolability on land and sea, in peace and war,—ἀσυλία καὶ ἀσφάλεια κατὰ γῆν καὶ κατὰ θάλασσαν πολέμου καὶ εἰρήνης.

Apart from all these occasional concessions, granted for special reasons, various rights were permanently extended to foreigners, in accordance with their rank or status—more or less clearly defined—as recognized by the particular State concerned. In Athens several classes were distinguished. Occupying an intermediate position between the full citizens and the barbarians, these were (enumerating in descending order as to the extent of rights enjoyed), the naturalized aliens (δημοποίητοι), the ‘public guests,’ so specifically legalized, constituting largely the πρόξενοι, the *isoteles* (ἰσοτελεῖς), the *metoec*s, or domiciled aliens (μέτοικοι), and non-domiciled aliens.

The naturalized alien held the title of citizen by virtue of a decree of the people in his favour. He enjoyed the general rights of citizenship, but with certain restrictions.²

¹ Cf. H. H. Meier, *De proxenia sive de publico Graecorum hospitio* (Halle, 1843), pp. 21 *seq.*; V. Thumser, *De civium Atheniensium numeribus* (Wien, 1880), pp. 110 *seq.*

² See G. Gilbert, *Handbuch der griechischen Staatsalterthümer*, 2 Bde. (Leipzig, 1881-85), vol. i. p. 177. And see further *infra*, on naturalization in Greece, chap. viii.

Proxenoi. The *proxenoi* corresponded approximately to our consuls, agents, or residents. They enjoyed their privileges on condition of their entertaining and assisting in various ways the ambassadors and private citizens of the States they represented.¹

Isoteles. The *isoteles* were metoecs exempt from such taxes as were peculiar to the latter; indeed, in point of taxation, they were practically on the same footing as citizens.²

Metoecs. The *metoecs* were domiciled aliens who enjoyed the protection of the Athenian laws through the agency of a patron (*προστάτης*), and were subject to special taxation, to compulsory military service by land and sea, and to certain other compulsory duties and burdens.³

Non-domiciled aliens. The non-domiciled aliens were subjects of cities with which Athens⁴ had commercial relationships or other intercourse, but who had not been formally authorized by law to settle definitely on her territory. They were not included in her regular population. According to the theory of the law, such aliens were to be esteemed 'enemies,' but in the post-heroic period of Athens, this theory was virtually obsolete. In actual practice these non-domiciled aliens were almost assimilated to the metoecs, being like them under the jurisdiction of the *xenodikai*, or the polemarch, as the case may be.⁵ There are no specific texts extant indicating the legal status of this class of inhabitants; but there is no doubt that their persons and property were adequately protected, as is shown to some extent in the speeches of the Attic orators discussing commercial

Position of
non-domiciled
aliens.

¹ For a full treatment of the *proxenoi* see *infra*, pp. 147 *seq.*

² Cf. *infra*, the latter portion of chap. vii.

³ For preciser definition of metoecs and detailed treatment see *infra*, pp. 157 *seq.*

⁴ Of course these distinctions and practices do not apply exclusively to Athens; but here the Athenian system is more particularly considered.

⁵ See further *infra*, chap. viii. *in fin.*, as to the position of foreigners in general from the point of view of the local jurisdiction.

transactions in which foreigners were engaged. They were debarred from serving in the army, and also from being initiated in the mysteries;¹ and very probably certain other private rights given to metoecs were withheld from them. To conclude, as Schenkl² does, that they were wholly deprived of the benefit of the law is an entirely unwarrantable assumption. If this were so the institution of the proxenoi—officials purposely appointed to see to the interests of aliens, their fellow-countrymen—would be a mere chimera.

It will now be well to enter a little more fully into the system of *proxenia*, the rights and duties of the domiciled alien, and the mode, conditions, and effects of naturalization.

PROXENIA.³—This institution was by no means peculiar to the Hellenic nations. More or less similar practices obtained amongst many peoples of antiquity, as, for example, the Egyptians. There are definite inscriptions which indicate that a system of this kind was known to the Phoenicians and to the Carthaginians; there is, moreover, epigraphic evidence that the Carthaginians were also fully acquainted with the use of the *tessera hospitalis* (or *tessera hospitalitatis*) so well known to the Romans. The system was most largely in force in Greece, and dated from the time of the Trojan war.⁴ For practical purposes, the history of the institution may be said to commence at about the end of the seventh century before the Christian era; the oldest extant epigraphic texts relating thereto are from Olympia,⁵ Locris,⁶ Corcyra,⁷ and Petilia.⁸ As regards

Proxenia.

Amongst
ancient peoples
in general.

The institution
in Greece.

¹ *Corp. jur. Att.* 34.

² H. Schenkl, *De metoecis Atticis* (*Wiener Studien*, t. ii. (1880), pp. 161-225), p. 213.

³ Cf. P. Monceaux, *Les Proxénies grecques* (Paris, 1886); Schubert, *De Proxenia Attica* (Leipzig, 1886).

⁴ Eustathius, *Ad Iliad.* iii. 204; iv. 377; cf. Liv. i. 1; and Plin. *Hist. nat.* xxxv. 9.

⁵ H. Roehl, *Inscriptiones Graecae antiquissimae* (Berlin, 1882), 113, 117, 118.

⁶ *Ibid.* 322.

⁷ *Ibid.* 342.

⁸ *Ibid.* 544.

Athens the earliest document of this kind that we possess dates from the middle of the fifth century;¹ but, no doubt, in view of the early poetic and historic references, the institution existed in that city before this time. The system exerted a great influence in diminishing Greek exclusiveness and stimulating cosmopolitan tendencies. "La proxénie est un grand pas fait par la Grèce hors de l'isolement oriental."² It also tended to foster pacific relationships, and to mitigate the horrors of war.

Proxenia
and public
hospitality.

Proxenia, in the stricter sense, is not to be confounded with the institution of public hospitality (*ξενία*, the guest-tie); but the distinction between them was not always a hard and fast one. Thus, certain treaties of proxenia amounted to scarcely more than treaties of public hospitality, *e.g.* the treaties concluded between Agrigentum and the Molossi,³ between Delphi and the towns of Sardes and Cipsaera.⁴ Xenia was the more ancient, and represented the purely amicable relationships between the host and his foreign guest. On the other hand, the later proxenia took the form of a real contract, explicitly entered into, and was the natural outcome of the vaguer guest-tie, having been necessitated by the enlargement of pacific relationships generally, and more particularly by the growth of commercial intercourse.

Private and
public ties of
hospitality—
hereditary.

In early times, individuals and whole families of different States frequently established a bond of hospitality between them,—a bond which became hereditary, as is depicted in the episode of Glaucus.⁵ In process of time the extent of such relationships was enlarged so as to include entire States as well as families and individuals, as, for example, where the Pisistratidae

¹ *Bulletin de correspondance hellénique* (Paris), vol. i. p. 303; *Corpus inscriptionum Atticarum* (1873, etc.), i. 27; Suppl. p. 9.

² Laurent, *op. cit.* vol. ii. p. 113.

³ Cf. C. Carapanos, *Dodone et ses ruines* (Paris, 1878), p. 52.

⁴ *Bull. de corr. hell.* (1881), p. 400.

⁵ Cf. *Iliad*, vi. 215 seq.

became the proxenoi of Sparta. Similarly, Romans of distinction became the protectors of foreign cities.¹

Proxenia is, in many respects, the prototype of our modern consular system. In modern Greek the word *πρόξενος* is used as the equivalent of our word *consul*. But it is not to be inferred that there is a complete identity between the two institutions. They were alike in that both were adapted to meet the demands of citizens trading with foreign States; the proxenoi, like our consuls, supplied information to the government that appointed them, and also furnished advice and assistance to the citizens who were subjects of that government whilst residing temporarily or more permanently in the territory of the other country. The differences between them are due to the differences in the constitution and in the very conception of ancient and modern States. The appointment of the proxenoi really arose from the fact that the system of regular and permanent ambassadors or other official and diplomatic representatives was as yet impossible. In the first place, the modern consul is usually a native of the country which appoints him; the proxenus was invariably a citizen of that country which received the subjects of the State thus represented. Secondly, the appointment did not necessarily confer on the proxenus any official status in his own country; but in the country he represented he received various honours and such privileges as almost amounted to citizenship. Thirdly, the government appointing him possessed no regular means of compelling him to perform the duties he undertook, or of punishing him for any breach of faith. Lastly, the modern consuls have not, as a rule, any political functions; the proxenoi, on the contrary, fulfilled many duties of a political description.

In spite of the fact that the foreign countries, on whose behalf the proxenoi acted, had no recognized right of legal action against them in case of default,

Proxenia—and
the modern
consular
system.

How far
similar.

Differences
between them.

Fidelity of
proxenoi.

¹ See *infra*, chap. ix., on *hospitium publicum*.

nevertheless we find from the numerous examples reported that they were generally assiduous in their duties and faithful to their trust. The office tended to become hereditary,¹ in the same way as the private institution (the *ξενία*) had done,—a fact which supplies additional testimony to good faith. Most of the decrees respecting proxenoi embodied the formula, *αὐτῷ καὶ ἐκγόνοις*, thus referring specifically to their descendants.

Appointment
of proxenoi.

Proxenoi were appointed either by the foreign government, which was the general rule and the case in Athens and other Greek cities, or by the protecting State, as was the case in Sparta, for instance, where the king² or the people³ nominated such officials to take cognizance of the affairs of foreigners in general. Xenophon, the great admirer of Spartan polity, was inspired by this example when, discussing the granting of privileges to foreign merchants and the advantages of increased traffic, he suggested the institution of a special magistrate for foreigners,—rather a kind of guardian for strangers after the manner of the existing guardians of orphans.⁴

Notable
examples of
proxenoi.

As examples of Athenian proxenoi may be mentioned Pindar at Thebes, Thucydides at Pharsalos, Doxander at Mitylene;⁵ as Spartan proxenoi at Athens, Cimon, Alcibiades, and Callias.⁶ Similarly, Nicias represented Syracuse at Athens,⁷ where also Demosthenes and

¹ Thuc. iii. 2 ; v. 43 ; Xenoph. *Symp.* ix. 39 ; and cf. *Corp. inscrip. Att.* i. suppl. 61a ; ii. 3, 36, 380 and others.

² Cf. Herodot. vi. 57 : καὶ προξείνους ἀποδεικνύναι τούτοις προσκίεσθαι τοὺς ἀν' ἐθέλωσι τῶν ἀσπῶν . . . (But here the proxenia took rather the form of a λειτουργία, a public charge or burden.)

³ Diog. Laert. ii. 51 ; *Corp. inscrip. Graec.* 1335.

⁴ *De vectig.* ii. 7, where Xenophon speaks of the μετοικοφύλαξ, overseer and guardian of the μέτοικοι, and of the ὀρφανοφύλαξ, guardian of orphans, who had lost their fathers in war.

⁵ Isocrat. *Antid.* § 166 ; Thuc. viii. 92 ; Arist. *Polit.* v. 4. 6 ; cf. Thuc. ii. 29 ; iii. 2. 85 ; Xenoph. *Hell.* i. 1. 35, etc.

⁶ Andocid. *De pace cum Laced.* 3 ; Thuc. v. 43 ; vi. 89 ; Xenoph. *Hell.* v. 4. 22 ; cf. vi. 1. 4.

⁷ Diodor. xiii. 26.

Thrasso represented Thebes.¹ At Sparta, Lichas represented Argos,² and Pharax Boeotia.³ At Delphi there appears to have been a set of official proxenoi.⁴ Tyrants also and 'barbarian' countries had their proxenoi.⁵

The Greek cities sometimes appointed foreign citizens, who had resided with them as hostages and had made themselves popular and esteemed. Thus the Achaeans nominated as proxenoi the hostages of various Boeotian and Phocian States, and, in this connection, an extant inscription speaks, in a formula which had practically become stereotyped, of their being accorded freedom from special taxation, inviolability on land and sea, in peace and war.⁶ Similarly Athens, in a decree approving the treaty with Selymbria (a town of Thrace, on the Propontis), conferred the honour of proxenus on Apollodorus, a liberated hostage of that country.⁷

Privileges of proxenoi.

It is not known definitely whether proxenoi received any payment for their work. In any case, no general rule can be laid down. There is no doubt that some, at all events, acted gratuitously, either after nomination by a State, or on their own offer made voluntarily and in the first instance to execute the necessary duties. Hence we find some of these officials termed ἐθελo-πρόξενοι, one of whom, as mentioned by Thucydides, was a certain Peithias, who voluntarily acted as the

Doubtful whether they received payment.

¹ Aeschin. *De legat.* 143; c. *Ctesiph.* 138.

² Thuc. v. 76.

³ Xenoph. *Hell.* iv. 5. 6.

⁴ Eurip. *Ion*, 551, 1039; *Androm.* 1103; cf. Pindar, *Nem. Od.* vii. 63, where he speaks of Δελφοὶ ξεναγέται, — though this phrase refers rather to the hospitality of the Delphians than to any specific official institution.

⁵ Cf. Xenoph. *Anab.* v. 4. 2; vi. 11; *Corp. inscrip. Graec.* no. 87.

⁶ *Corp. inscrip. Graec.* no. 1542: ... τοῖς ὁμήροις τῶν Βοιωτῶν καὶ Φωκέων προξενίαν δόμεν. ...

καὶ εἰμεν αὐτοῖς ἀτέλειαν καὶ ἀστυλίαν καὶ πολέμου καὶ εἰρήνης καὶ κατὰ γῆν καὶ κατὰ θάλατταν καὶ τὰλλα πάντα ὅσα καὶ τοῖς ἄλλοις προξένοις [κα]ὶ εὐεργέταις δίδονται. ...

⁷ *Corp. inscrip. Att.* i. suppl. 61a.

proxenus of the Athenians and was the popular leader.¹ Perhaps the most that can be said on this point is that at first the office was an honorary one, and afterwards certain emoluments (apart from honours and distinctions) were attached thereto.

International
position of the
proxenus.

Protector of
foreign
interests and
foreign
subjects.

Large variety
of his
functions.

Obviously the proxenus occupied an important position in international relationships of all kinds. He was the intermediary between the two cities. He was the protector (προστάτης)² of foreigners in general, and espoused their cause.³ He acted in their favour, as Cimon the Athenian did for Sparta, and Timosthenes of Carystus for Athens, before the political assemblies, and also before the local tribunals, in order to ensure their financial, judicial, and religious interests.⁴ If the foreign city which he represented was in any way involved in legal proceedings, he introduced to the court the *συνδικοι*, or advocates, who had been despatched to plead its cause.⁵ He was present, as a witness, at certain civil transactions of his protégés, and particularly at the making of their wills.⁶ He determined the succession of deceased foreigners, who died without heirs.⁷ He obtained security for the loans of the strangers under his protection, and even acted as a broker as between the merchants of the two States in question.⁸ Only occasionally, however, did he sell the goods in his own name

¹ iii. 70: καὶ ἦν γὰρ Πειθίας ἐθελοπρόξενός τε τῶν Ἀθηναίων καὶ τοῦ δήμου προειωτήκει. . . .

² As to the *προστάτης* in connection with the special class of metoecæ, see *infra*, p. 160.

³ *Corp. jur. Att.* p. 585, note to art. 1257 (Schol. ad Demosth. *Leptin.* 475. 5): Πρόξενοι λέγονται οἱ ἐν τοῖς δῆμοις τοὺς ἐπιδημοῦντας δεχόμενοι, φίλοι τυγχάνοντας καὶ κοινῇ καὶ ἰδίᾳ.—Cf. Schol. in Aristoph. *Aves*, 1021: Πρόξενοι εἰσιν οἱ τεταγμένοι εἰς τὸ ὑποδέχεσθαι τοὺς ξένους ἐξ ἄλλων πόλεων ἤκοντας.

⁴ See Suidas, *s.v.* πρόξενος; Schol. ad Herodot. vi. 57; Eustathius, *Ad Iliad.* ii. 204; iv. 377: . . . πρόξενος μὲν ὁ ὑπὸ πόλεως ἡξιωμένος ἐν τῇ σφετέρᾳ προϊστασθαι ξένων.

⁵ *Corp. inscrip. Graec.* 2353.

⁶ *Ibid.* 4; Roehl, *Inscr. Gr. antiq.* 544.

⁷ Demosth. *c. Calipp.* 5 *seq.* . ⁸ Pollux, iii. 59; vii. 4.

(προπράτωρ); he was, more frequently, the mere intermediary between seller and purchaser (προξενητής). He was for a State what the private patron (προστάτης, in the strict sense) was for an individual or a family. He received also such aliens as were not provided with any lodging; and sometimes he was chosen by them (apart from his already existing office) as their private πρόστατης. At times, if they had no private πρόστατης, he became theirs by virtue of his office of πρόξενος. Apart from these functions, which were usual and understood, Athens often gave her proxenoi special instructions.¹

Further, the proxenus received the foreign ambassadors and other diplomatic officials, procured for them admission to the assemblies, to the temples,² and to the theatres,³ and assisted, to some extent, in the formulation and conclusion of treaties. When there was a desire on the part of a community to conclude a peace or renew a truce, it was usual to make application or otherwise commence overtures through its proxenus; indeed, not infrequently did he take the initiative by proposing the conclusion of treaties.⁴

His part in
diplomatic
affairs.

They played an important part in many departments of diplomatic activity. Sometimes they intervened in cases of imminent war between their own State and that represented. At the time of the Peloponnesian war the Corcyraean proxenoi at Corinth guaranteed the ransom of a large number of Corcyraeans who had been taken prisoners.⁵ Along with soothsayers, they occasionally pronounced imprecations against those who would break treaties that had been concluded.⁶ In a large number of cases they were despatched as ambassadors to cities which they had represented in their own country. Thus Callias, the proxenus of Sparta, was sent to Sparta on more than one occasion by Athens.⁷ At the time of the

¹ *Corp. inscrip. Att.* ii. 186.

² *Bull. corr. hell.* v. p. 400.

³ *Pollux*, viii. 59; *Eustath. Ad Iliad.* iv. 207.

⁴ *Thuc.* v. 59.

⁵ *Thuc.* iii. 70.

⁶ *Roehl, Inscr. Gr. antiq.* 118.

⁷ *Xenoph. Hell.* vi. 3. 3-5.

conflict with Philip, Athens sent to Thebes Thraso of Erchia and Demosthenes, proxenoi of Thebes, as ambassadors to negotiate for an alliance.¹ In the Peloponnesian war Lichas, proxenus of Argos at Sparta, was several times chosen to negotiate between the two cities.²

Proxenoi as arbitrators.

Proxenoi, again, often acted as arbitrators in controversies between cities or between private individuals. Thus, Cimon of Athens, the proxenus of Sparta, was nominated as arbitrator between Athens and Sparta.³ Numerous examples of proxenoi who officiated as arbitrators are mentioned in inscriptions found in Laconia, in Boeotia, in Delphi, in Thessaly, in the Cyclades, and on the coast of Asia Minor.⁴

The character of proxenia varied in different parts of Greece.

In reference to the different functions of the proxenoi above mentioned, it is to be remembered that the institution varied greatly in different parts of Greece. As M. Monceaux says, it assumed more particularly a religious, or a commercial, or a political character in proportion as the activity of the cities concerned was chiefly directed to religion, commerce, or politics respectively. "Comme le proxène représentait la ville étrangère en tout, la proxénie est devenue naturellement une institution surtout religieuse dans les cités sacerdotales, commerciale dans les cités commerçantes, politique et diplomatique dans les grands États qui ont aspiré à un rôle politique."⁵

Privileges bestowed on proxenoi.

In recognition of their important position and the considerable services rendered by them, many privileges were granted to them which, however, varied at different times and in different localities. These privileges were of two kinds, honorary and special. The latter, amongst the Ionian peoples generally, varied according to this or that proxenus; amongst the Aetolians and Dorians both kinds were usually

¹ Aeschin. *De legat.* 141-3; *De coron.* 138.

² Thuc. v. 76.

³ Plut. *Cimon*, 14.

⁴ *Corp. inscrip. Graec.* 2264 e add., 2671; *Bull. corr. hell.* vi. p. 139.

⁵ In Daremberg-Saglio, *op. cit.*, s.v. *Proxenia*.

conferred as a whole on each proxenus. Of course, the nature and extent of their civic and political rights depended on whether they were or were not citizens of the countries in which they acted. If they had not acquired citizenship, they possessed all such rights as could be obtained by foreigners who had not become naturalized. In a war between their own State and that which they represented, their persons and property were protected. As has before been pointed out, they enjoyed inviolability, ἀσυλία; some inscriptions speak of their enjoying 'peace in war,' εἰρήνην ἐν πολέμῳ;¹ in a word, they received the general protection (ἀσφάλεια) of the States concerned.² Thus Cleonicus of Naupactus, the proxenus of the Achaeans, having been made prisoner, was not sold, but was liberated even without ransom,—
 ἔλαβε δὲ καὶ Κλεόνικον τὸν Ναυπάκτιον, ὃς διὰ τὸ πρόξενος ὑπάρχειν τῶν Ἀχαιῶν παραπᾶσι μὲν οὐκ ἐπράθη, μετὰ δὲ τινα χρόνον ἀπείθη χωρὶς λύτρων.³

Further, they shared the privileges of ἀτέλεια and ἰσοτέλεια, that is, exemption from certain taxes, custom duties, or other occasional monetary burdens specially imposed on resident foreign subjects, and thus were, in this respect, practically assimilated to citizens. And also, like full citizens, they were empowered to acquire property in land and houses (ἐγκλησις). These immunities and concessions are clearly expressed in the following inscription: τοῖς προξένοις εἶναι γῆς καὶ οἰκίας ἐγκλησιν καὶ ἰσοτέλειαν καὶ ἀσφάλειαν καὶ ἀσυλίαν καὶ πολέμου καὶ εἰρήνης οὔσης, καὶ κατὰ γῆν καὶ κατὰ θάλατταν.⁴

Again, they had the right to have their official cases tried before others (the privilege itself being termed

¹ Cf., for example, *Corp. inscrip. Graec.* 2330.

² See *Corp. inscrip. Att.* i. suppl. 116 a; ii., *add.* 1 c; iv. 54 b; and cf. *Demosth. c. Aristoc.* 89; *De Halon.* 38; *Lysias, c. Ergocl.* 1; *c. Philocr.* 2.

³ *Polyb.* v. 95.

⁴ *Corp. jur. Att.* 1239; *Corp. inscrip. Graec.* 1562-7.—Cf. the passage of an inscription (*Corp. inscrip. Graec.* 1542) quoted *supra*, in note 6, p. 151.

προδικία, and the causes enjoying such priority, δίκαι πρόδικοι). They possessed the right of access to the public assemblies, which they were entitled to address immediately after the completion of the sacrifices,—πρόσδοος πρὸς τὴν βουλὴν καὶ τὸν δῆμον πρῶτῳ μετὰ τὰ ἱερά. They were permitted to use a special seal¹ in their official transactions. They were exempted from the obligation to have a patron (προστάτης). They enjoyed ἐπινομία (the right of pasture on the commons), the right of importing and exporting all kinds of goods by sea and by land, the right of free entry into port even in time of war; also the privilege of consulting the oracle before others, προμαντεία; burial at the expense of the State.² In several Dorian States they received ἰσοπολιτεία, in some Ionian cities complete citizenship, πολιτεία.

Importance of
the proxenoi
in international
relations.

Thus it is obvious that owing to the multiplicity and importance of their functions—as permanent intermediaries between their own and the foreign city, as the latter's patrons before their own courts and assemblies, as diplomatic agents, and as arbitrators,—the proxenoi exerted a profound influence on the development of interstatal relationships in Greece. “En résumé, comme intermédiaires permanents entre deux cités, comme patrons d’une ville étrangère devant les tribunaux et les assemblées de leur patrie, comme diplomates et négociateurs des traités, comme arbitres entre les États, les proxènes ont joué un rôle considérable dans la vie internationale de la Grèce ancienne.”³

¹ Pardessus, *op. cit.* i. p. 52.

² For a fuller enumeration of the minor privileges, see P. Monceaux in Daremberg-Saglio, *op. cit.* p. 738, *s.v.* *Proxenia*.

³ Monceaux, *loc. cit.* p. 740.

CHAPTER VII

THE METOEC.—RIGHTS AND DUTIES OF THE DOMICILED ALIEN¹

THE position of the metoec has given rise to much controversy, and writers are by no means yet agreed on the subject. In the first place very few definite texts, literary or epigraphic, are available ; and secondly, some of the older grammarians and commentators, who have touched upon this question, are mostly inconsistent with each other in their attempted elucidations, and sometimes, indeed, have carelessly misrepresented an observation or reference of the older classical writers.

The position of the metoec—controversial subject.

The ancient laws and usages regarding metoecs are of the utmost importance in the whole field of international law, public and private alike. The gradual

Importance of the systematic rights given to metoecs.

¹ The present chapter is much indebted to M. Clerc, *Les métèques athéniens.—Étude sur la condition légale, la situation morale et le rôle social et économique des étrangers domiciliés à Athènes* (Paris, 1893). Other works may be consulted as follows:—E. Catellani, *Diritto internazionale privato nell' antica Grecia* (in *Studi e documenti di storia e diritto*, Roma, 1892), sect. iv. ; G. Gilbert, *op. cit.* vol. i. pp. 195 *seq.* ; U. von Wilamowitz-Möllendorff, *Demotika der Metoeken* (in *Hermes.—Zeitschrift für classische Philologie*, Berlin, vol. xxii. (1887), pp. 107-128, 211-259) ; G. de Sainte-Croix, *Mémoire sur les Métèques* (in *Mémoires de littérature tirés des Registres de l'Académie Royale des Inscriptions et Belles Lettres*, t. xlviii. (1808), pp. 176-207) ; H. Schenkl, *De metoecis Atticis* (*Wiener Studien*, t. ii. (1880), pp. 161-225).—For detailed and classified information relating to the position of domiciled aliens in the different Greek States, see M. Clerc, *De la condition des étrangers domiciliés dans les différentes cités grecques*. In *Revue des universités du midi*, Bordeaux, tome iv. (1898), pp. 1-32, 153-180, 249-274.

recognition by States of specific rights and duties conferred or imposed on non-citizens tended to break down the barriers of a rigid national exclusiveness, to modify the old customary attitude of, as it were, an *a priori* hostility, to mitigate the severity of practices in war. Such recognition promoted amicable international relationships, social, commercial, or intellectual, and was largely instrumental in fostering the conception of international comity, a conception which underlies the whole fabric of the modern law of nations. Of course, this notion was not then as clearly defined and as explicitly expressed as it is now ; but even in its comparatively rudimentary form, it did much to transfer principles from the philosophical and moral to the juridical consciousness.

Meaning of the word *metoec*.

The word μέτοικος is derived from μετά, οἰκέω, and hence, in its literal signification, means a person who dwells with others. The mere fact of being thus resident or domiciled in a city did not, strictly speaking, carry with it, from the constitutional point of view, any rights whatever incidental to citizenship. As Aristotle says : " A citizen is not a citizen simply because he lives in a certain place, for resident aliens and slaves share in the place."¹ The term, to which the Latin *inquilinus*, *incola*, and *peregrinus* more or less approximate, is opposed to ἀστός, πολίτης (countryman, citizen) on the one hand, and to ξένος (stranger, foreigner) on the other. In the case of the latter, however, the discrimination was not always sharp and precise ; and ξένος was also generally distinguished from βάρβαρος, barbarian, non-Hellene.² Perhaps the best English expression corresponding to μέτοικος is 'resident alien,' or 'domiciled alien.' In German the Teutonized word *Schutzverwandte* has been frequently employed by writers ; but, as it is clearly seen from its constituent parts, it implies the idea of protection and not that of

¹ Πολιτ. iii. 1, 3 : ὁ δὲ πολίτης οὐ τῷ οἰκεῖν που πολίτης ἐστίν. καὶ γὰρ μέτοικοι καὶ δούλοι κοινωνοῦσι τῆς οἰκήσεως.

² See *supra*, pp. 40, 127.

domicile; hence its connotation is at once too narrow and too wide.

The best definition that has come down to us from the earlier writers is undoubtedly that formulated by Aristophanes of Byzantium (born c. 260 B.C.) one of the most eminent Greek grammarians at Alexandria : μέτοικος δ' ἔστιν, ὁπόταν τις ἀπὸ ξένης ἐλθὼν ἐνοικῇ τῇ πόλει, τέλος τελῶν εἰς ἀποτεταγμένας τινὰς χρείας τῆς πόλεως. Ἔως μὲν οὖν ποσῶν ἡμερῶν παρεπίδημος καλεῖται καὶ ἀτελής ἐστὶν ἐὰν, δὲ ὑπερβῇ τὸν ὠρισμένον χρόνον, μέτοικος ἤδη γίγνεται καὶ ὑποτέλης.¹ Here the three necessary conditions are indicated, viz. a definite intention on the part of a foreigner to settle in a city (*animus manendi*), coupled with his actual establishment therein (*factum*), residence of a certain length of time, and contribution to certain public charges.

Definition of the word *metoec*.

The systems adopted by the different States varied to a greater or lesser extent; and, in fact, the practice of each particular city varied from time to time, in accordance with the oscillations of political power, and with the exigencies of public policy. Similarly, the number of metoecs varied considerably in the different communities. Sparta, for example, for a long time excluded them altogether. Athens, in the days of her greatness, probably contained some fifty thousand out of a total population of about half a million,² of which some hundred thousand were freemen. At Agrigentum they formed the greater part of the population.³ No doubt Athens was largely indebted to them for her commerce and industry; and, on this account, Xenophon thought it would be well if suitable honours and distinctions

Different systems in the Greek cities.

Influence of domiciled aliens on Athenian commerce.

¹ A. Nauck, *Aristophanis Byzantii . . . fragmenta* (1848), frag. 38.

² Schoemann, *Griechische Alterthümer*, *op. cit.* vol. ii. p. 3. (It is to be noted, however, that far different estimates of the Athenian population in general have been made by other writers.)

³ Diodor. xiii. 84. 4 : κατ' ἐκείνον γὰρ τὸν χρόνον Ἀκραγαντίνοι μὲν ἦσαν πλείους τῶν δισμυρίων, σὺν δὲ τοῖς κατοικοῦσι ξένοις οὐκ ἐλάττοις τῶν εἴκοσι μυριάδων.

were conferred on them. "It would be for our advantage and credit also that such merchants and shipowners as are found to benefit the State by bringing to it vessels and merchandise of great account should be honoured with seats of distinction on public occasions, and sometimes invited to entertainments; for, being treated with such respect, they would hasten to return to us, as to friends, for the sake, not merely of gain, but of honour."¹

Obligation to
have a patron.

Was public
authorization
necessary
for their
admission?

Taking Athenian practice as the most enlightened, and as being fairly representative of that of other cities, we find in the Hellenic world that every metoec was obliged to select some citizen as a patron (*προστάτης*), thus establishing a relationship which somewhat resembled that between the Roman *patronus* and *cliens*. Probably public authorization, as is conjectured by Schoemann,² was first required; and in Athens this was effected by the Areopagus. But, it must be admitted, this supposition appears to be based on a passage of Sophocles, which is not quite conclusive, though it certainly shows that the conjecture is not altogether unwarrantable. In the passage referred to Creon says to Theseus: "Such the wisdom, I knew, that dwells on the mount of Ares in their land; which suffers not such wanderers to dwell within this realm. In that faith, I sought to take this prize."

τοιούτον αὐτοῖς Ἄρεος εὐβουλον πᾶγον
ἐγὼ ξυνήδη χθόνιον ὄνθ' ὃς οὐκ ἔφα
τοιούσδ' ἀλήτας τῇδ' ὁμοῦ ναίειν πόλει·
ᾧ πίστιν ἴσχω τήνδ' ἐχειρούμεν ἄργαν.³

Creon here refers to the polluted Oedipus who was in Attica, and assumes that if this came to the knowledge

¹ Xenoph. *De vectig.* iii. 4: 'Ἀγαθὸν δὲ καὶ καλὸν καὶ προεδρίας τιμᾶσθαι ἐμπόρους καὶ ναυκλήρους, καὶ ἐπὶ ξενίᾳ γ' ἔστιν ὅτε καλεῖσθαι, οἳ ἂν δοκῶσιν ἀξιολόγοις καὶ πλοίοις καὶ ἐμπορεύμασιν ὠφελεῖν τὴν πόλιν. Ταῦτα γὰρ τιμώμενοι οὐ μόνον τοῦ κέρδους ἀλλὰ καὶ τῆς τιμῆς ἕνεκεν πρὸς φίλους ἐπισπεύδουσι ἂν.

² *Op. cit.* vol. ii. p. 3, note 2.

³ *Oedip.* Col. 947-950.

of the Council of the Areopagus, it would take immediate steps for his expulsion. Such action would, of course, be within the jurisdiction of the Areopagus, which exercised a moral censorship, particularly so in the earlier history of the Athenian democracy. And even after the reforms of Pericles and Ephialtes we find that court taking cognizance of similar matters, though only by special warrant,—as, for example, where, having been instructed by the Ecclesia, it inquired into the conduct of a suspect and reported thereon: τοῦ δήμου προστάξαντος ζητῆσαι τὴν βουλὴν, . . . καὶ ζητήσασαν ἀποφῆναι πρὸς ὑμᾶς, ἀπέφηνεν ἡ βουλὴ . . .¹ On the other hand it may be argued that the authority constituted to exercise a moral censorship and to decree the expulsion of suspected foreigners is not necessarily the same authority which was empowered to grant strangers permission to take up their domicile within its jurisdiction, or to allow them to become naturalized.

In any case, authorization by special decree was essential. There are numerous examples where right of domicile was conceded to strangers *en masse*, especially so after a war in order to replenish the population. There was a law of Themistocles to the effect that— . . . τοὺς μετοίκους καὶ τοὺς τεχνίτας ἀτελεῖς ποιῆσαι ὅπως ὄχλος πολὺς πανταχόθεν εἰς τὴν πόλιν κατέλθῃ, καὶ πλείους τέχνας κατασκευάσωσιν εὐχερῶς.² But in treaties there were frequently special stipulations to exempt the subjects of the contracting parties from this formality; e.g. in the treaty between Hierapytna and Priansos, and in the treaty between the Latiani and the Olontani.

With regard to the duration of the period of settlement within the territory, it was either determinate or

¹ Dinarchus, *c. Demosth.* 58.—Cf. Plut. *Sol.* 22: καὶ τὴν ἐξ Ἀρείου πάγου βουλὴν ἔταξεν ἐπισκοπεῖν, ὅθεν ἕκαστος ἔχει τὰ ἐπιτήδεια καὶ τοὺς ἀργοὺς κολάζειν.—Cf. also Isocr. *Areopag.* 36-55.—See Jebb's note on the passage in question in his edition and translation of *Oedip. Col.*

² Diodor. xi. 43.

indeterminate. There was no fixed rule. It is significant, however, of the deeply rooted conception as to the antithesis of citizenship to alienage that such a philosopher as Plato is unwilling to depart from the temporary nature of the stranger's residence. "Anyone who likes," says he in the *Laws*, "may come to be a metoec on certain conditions; a foreigner, if he likes, and is able to settle, may dwell in the land, but he must practise an art, and not abide more than twenty years from the time at which he has registered himself. . . . But when the twenty years have expired, he shall take his property with him and depart."¹

Names of the metoecs enrolled in special registers.

Liability for fraudulent entry.

The *prostates*—their patron.

The names of the metoecs were inscribed in special registers, as Plato suggests in the above passage; and on their leaving the country again they had to appear before the magistrate to have their names removed.² An action, *γραφὴ ξενίας*, lay against metoecs who neglected to get themselves enrolled on the register; and should they fraudulently procure an entry of their names on the list of citizens, they were liable to a criminal prosecution *γραφὴ ἀπροστασίου*,³ which applied also in case they neglected to choose a patron. If found guilty of wilful infringement of this law, they could be sold as slaves.⁴

The *prostates* was their intermediary in most of their juridical and political relationships with the State. It is probable that in a good many miscellaneous matters metoecs could act on their own behalf without this customary intervention. For example, a *prostates* was usually necessary for the commencement of a suit by them before the tribunals, but when it was once set in motion

¹ viii. 850 b: *λέναι δὲ τὸν βουλόμενον εἰς τὴν μετοίκησιν ἐπὶ ῥητοῖς, ὡς οἰκήσεως, οὐσης τῶν ξένων τῷ βουλομένῳ καὶ δυναμένῳ κατοικεῖν, τέχνην κεκτημένῳ καὶ ἐπιδημοῦντι μὴ πλέον ἐτῶν εἴκοσιν ἀφ' ἧς ἂν γράβηται . . . ὅταν δ' ἐξήκωσιν οἱ χρόνοι, τὴν αὐτοῦ λαβόντα οὐσίαν ἀπιέναι.*

² Cf. Plato, *Laws*, viii. 850 c: *ὁ δὲ ἀπὼν ἐξελευψάμενος ἴτω τὰς ἀπογραφὰς, αἵτινες ἂν αὐτῷ παρὰ τοῖς ἀρχουσι γεγραμμένοι πρότερον ᾖσιν.*

³ See Meier and Schoemann, *op. cit.* p. 390.

⁴ *Ibid.* p. 391.

they were allowed to continue the proceedings independently. Thus in one of the orations of Demosthenes¹ we find a metoec making an independent appearance in court; and in a Greek poet² of the third century, B.C., we read of a keeper of a disorderly house (πορνοβοσκός)—who is obviously a metoec—pleading in person before a Coan court of justice. Aliens, in the strict sense, had no right to appear in person before the polemarch, who had special jurisdiction over them; an eligible introducer was necessary. *Proxenoi* possessed this right, but only by virtue of a special decree of the people. Registered metoecs enjoyed this privilege, simply by virtue of their having been received as *metoecs*.

The functions of the *prostates* and the nature of the metoecs' dependence on and general relationships with him are not clearly known. The earliest references to such a functionary are found in the fourth century texts; none of the writers of the previous century specifically mentions the *prostates* of metoecs. Aristophanes,³ indeed, makes use of the word *προστάτης*, as M. Clerc points out, not really in reference to metoecs as such, but in reference to Hyperbolos, the unworthy 'chief' chosen by the Athenians. The application in the more technical sense is made by the scholiast alone, who unjustifiably extends the force of the text. Other passages making mention of the *prostates* are found in Demosthenes,⁴ Hyperides,⁵ Isocrates,⁶ and Aristotle, who says: "Even resident aliens in many places possess such rights [*i.e.* the right of appearing before the tribunals either as plaintiff or as defendant], though in an imperfect form; for they are obliged to have a 'patron.'"⁷ All these

Relations of
prostates and
metoec.

¹ *c. Dionysodorum*.

² Herondas, *Mimiambi*, 2.

³ *Pax*, 683-684:

Ἀποστρεφέται τὸν δῆμον ἀχθεσθεῖς ὅτι
οὕτω πονηρὸν πρόστατὴν ἐπεγράψατο.

⁴ *c. Aristog.* 58.

⁵ *c. Aristog.* in *Orat. Att.* ii. 385, frag. 26.

⁶ *De pace*, 58.

⁷ *Polit.* iii. 1. 4: Πολλαχοῦ μὲν οὖν οὐδὲ τούτων τελέως οἱ μέτοικοι μετέχουσιν, ἀλλὰ νέμειν ἀνάγκη πρόστατὴν.

texts give very little information on the subject ; it is the scholiasts and lexicographers who have attributed to the *prostates* the large functions of an intermediary, through whom, as it is averred, not only the metoecs' special and distinctive tribute (the *μετοίκιον*) was paid to the State, but all their public and private transactions with the citizens were carried on.¹

Intervention of
prostates
improbable in
most private
relationships.

As to most public transactions this was probably the case ; but in regard to the multiplicity of private relationships the invariable intervention of a third party in the person of a specially appointed *prostates* would seem improbable, if not impossible ; and particularly so, when we recollect that the metoecs—according to a common calculation—formed nearly half of the free population of Athens. Besides, as Wilamowitz-Möllendorff² reminds us, the polemarch, by virtue of his specially constituted juridical capacity, was already an official intermediary (using this word, of course, in a broader sense) between the city and foreigners. Hence there would be no effective reason, especially in matters directly touching his province, to interpose another individual between him and the metoecs. In some of the Greek States, such as the great commercial oligarchies like Corinth, there is no doubt that metoecs were allowed to enforce their private rights in their own names,³ without the intervention of a *προστάτης*, and, in many respects, were much in the same position as the *cives sine suffragio* at Rome. This was so because handicrafts were cultivated there, and foreign artisans were welcomed to stimulate the growth of industries in general.

Duties of
metoecs
towards their
prostates.

Some writers have assumed that they were obliged to render certain services to their patron in return for his assistance and protection ; but as there is no infor-

¹ Cf. Suidas, s.v. ἀπροστασίον (*Corp. jur. Att.* 28): τῶν μετοίκων ἕκαστος προστατήν ἔχει, κατὰ νόμον ἓνα τῶν ἀσπῶν, καὶ δι' αὐτοῦ τό τε μετοίκιον τίθεται κατὰ ἔτος καὶ τὰ ἄλλα διοικεῖται.

² *Demotika der Metoeken*, loc. cit. pp. 225 seq.

³ Arist. *Polit.* iii. 1.

mation to this effect in the available authorities, no definite conclusions on this point can safely be arrived at. The State maintained these relationships because it derived many advantages therefrom; and the *prostates* was satisfied to exercise his duties in return for the honours and privileges granted to him by his own community and that represented. Later, in addition to or in place of these distinctions certain emoluments were fixed. Minor services of various kinds were perhaps rendered to the patron by the metoecs,—but voluntarily, rather than under compulsion of any legal provisions. It is not justifiable to assume that this institution bore any fundamental resemblance to the mediaeval feudal system.

It will be well now to consider briefly the various specific rights and privileges conferred on metoecs, and the obligations imposed on them.

Rights and duties of metoecs.

As to the rights withheld from metoecs residing in Athens, they were, in the first place, debarred from *ἐπιγαμία*, that is, the right to marry an Athenian citizen.¹ The penalty for violating this provision was the seizure and sale of the offender's goods. If the offender was an Athenian male citizen he had to pay, in addition to this forfeiture, a fine of a thousand drachmas. Demosthenes² thus states the law on this question: "If an alien shall live as husband with an Athenian woman by any device or contrivance whatsoever, it shall be lawful for any of the Athenians, who are possessed of such right, to indict him before the judges. And if he is convicted, he shall be sold for a slave and his property shall be confiscated, of which the third part shall be awarded to the person who has obtained the conviction.

Rights withheld from them.

No right of intermarriage.

¹ Demosth. *In Neaer*. 16: Ἐὰν δὲ ξένος ἀσπῆ συνοικῇ τέχνη ἢ μηχανῇ ἡτινιοῦν· γραφέσθω πρὸς τοὺς θεσμοθέτας Ἀθηναίων ὁ βουλούμενος, οἷς ἔξαστιν. ἐὰν δὲ ἄλλῃ πεπράσθω καὶ αὐτὸς καὶ ἡ οὐσία αὐτοῦ, καὶ τὸ τρίτον μέρος ἔστω τοῦ ἐλόντος. Ἐστω δὲ καὶ, ἐὰν ἡ ξένη τῷ ἀσπῷ συνοικῇ, κατὰ ταῦτά. καὶ ὁ συνοικῶν τῇ ξένῃ τῇ ἀλούσῃ ὀφειλέτω χιλίας δραχμᾶς.

² *In Neaer*. 16, as cited in the last note.

And the like proceedings shall be taken if an alien woman live as wife with an Athenian citizen, and the citizen who lives as husband with an alien woman shall, on being convicted, incur the penalty of a thousand drachmas."

No right to hold property in public funds, land, and houses.

Metoece were not entitled to hold property in the public funds, nor in lands and houses,—*ἐγκτησις γῆς καὶ οὐκίας*. The holding of such property was considered an element of sovereignty, so that citizens alone could own immovables,—*μὴ εἶναι ξένοις γῆς καὶ οὐκίας ἐγκτησιν*.¹ To obtain this right a special decree of the people was necessary. They were likewise debarred from all mortgage transactions.²

If exiled, their property confiscated.

If they were exiled for any reason their property was confiscated—*τῶν φευγόντων αἱ οὐσίαι δημεύονται*.³

Could own slaves, and emancipate them.

They were, however, permitted to possess slaves and to emancipate them, under the same conditions as citizens exercised this right.⁴

No right of pasturage on the commons.

They had no right of pasturage on the public lands, *ἐπινομία*.⁵

Could not bring public actions.

They could not bring public actions, *γραφαί*, except such as directly concerned their own persons, and not a third party or the State.

Excluded from certain public offices.

They were excluded from certain public functions; for example, they were not permitted to serve as public arbitrators, or umpires, *διατηταί*, nor as ambassadors.

But exceptions made.

Certain exceptions, however, were sometimes made in favour of metoece of distinction, such as in the case

¹ *Corp. jur. Att.* 36.—Cf. Demosth. *Pro Phormio*, 6, where it is stated that Phormio, when he became lessee of a certain banking house and received the deposits, would not be able to get in the money that Pasion had lent on land and lodging-houses.

² Demosth. *Pro Phormio*, 6.

³ *Corp. jur. Att.* 1016.

⁴ It is thus related of one Apollodorus, who was an Athenian metoec from Samos; cf. Isaeus, *De Apollod. hered.* and cf. Harpocration, *s.v.* Πολέμαρχος.—See also *Corp. inscrip. Att.* ii. 2. 768, 772, and 773.

⁵ *Corp. inscrip. Graec.* 1385; A. R. Rangabé, *Antiquités helléniques, ou répertoire d'inscriptions et d'autres antiquités découvertes depuis l'affranchissement de la Grèce*, 2 vols. (Athènes, 1842-1855), no. 704.

of the philosopher Xenocrates¹ of Chalcedon in 322 B.C., and in that of the Theban philosopher Crates.² They were forbidden to speak at the assemblies of the people, — οὐ χρῆ ξένον τῶν ἐκκλησιῶν μετέχειν ἀγορεύοντα;³ and they were also excluded from competing in the public games, — ἀγῶν τις εὐανδρίας τοῖς Παναθηναίοις ἄγεται, οὐ κοινωνεῖν οὐκ ἔξεστι τοῖς ξένοις;⁴ though not from taking part in the dramatic performances and competitions, where sometimes, as in the Lenaeon festivals in honour of Dionysus,⁵ certain more or less onerous charges (λειτουργίαι) were imposed on them, e.g. the χορηγία, the equipping and bringing out of a chorus.

Special charges imposed on them.

As to taxes, metoec̄s had to pay through their patrons⁶ a fixed annual sum, the μετοίκιον, amounting to twelve drachmas in the case of men, and six in the case of women,⁷ when living in independence, that is, not in the house of their husbands or sons. Some writers, e.g. Schoemann,⁸ have asserted that an additional smaller tax of three obols, τριώβολον (i.e. half a drachma), had to be paid. This assertion appears to be based merely on certain texts from Menander, cited by Harpocration. Menander refers to the emancipated slave who paid the μετοίκιον, and an additional τριώβολον. And so because the additional half-drachma accompanied the μετοίκιον in the case of the freedman, it was unwarrantably assumed to accompany it in the case of the metoec̄.⁹ At all events, besides the ordinary charges of citizens and the distinctive μετοίκιον, they had to pay a special tax when trading in the market-place, and were further subject to extraordinary imposts, levied to meet

To pay an annual tax.

¹ Plut. *Phoc.* 27; Diog. Laert. iv. 2. 8-9. ² Plut. *Demetr.* 46.

³ *Corp. jur. Att.* 33.

⁴ *Corp. jur. Att.* 440.

⁵ Schol. ad Aristoph. *Plut.* 953.

⁶ Cf. note 7, page 163, *supra*.

⁷ *Corp. jur. Att.* 871 (Suidas, s.v. μετοίκιον): Τῶν μετοίκων ὁ μὲν ἀνὴρ δώδεκα δραχμὰς τελεῖ μετοίκιον, ἡ δὲ γυνὴ ἕξ. καὶ τοῦ υἱοῦ τελούντος, ἡ μήτηρ οὐ τελεῖ, μὴ τελούντος δὲ αὐτῇ τελεῖ.—Cf. *Corp. jur. Att.* 27 (Harpocration, s.v. μετοίκιον): Δίδονται δὲ ὑπ' αὐτῶν καθ' ἕκαστον ἔτος δραχμαὶ δώδεκα ὅπερ ὀνομάζεται μετοίκιον.

⁸ *Gr. Alt.* vol. ii. p. 53.

⁹ Cf. Clerc, *op. cit.* p. 21.

the exigencies of war or defence,¹ or to meet the expenditure incurred in the public feasts,² e.g. the εἰσφορά, a property-tax³ levied on citizens also, but the burden of the metoecs was greater, and the ἐπίδοσις, an ostensibly voluntary contribution, sometimes in money, sometimes in kind.⁴

Compulsory
military
service.

All metoecs were liable to compulsory military service,⁵ and usually played the part of a territorial army for the defence of the city and its ramparts. Those who could obtain at their own expense the necessary equipment were admitted as hoplites; the others served in the light infantry. Some also contributed to the recruiting of mercenary archers. Military command seems to have been occasionally entrusted to them,⁶ as military command abroad was allowed by the Spartans to their περίοικοι.⁷ As a rule, the metoecs were debarred from serving in the cavalry, the main reason for this being that Athenian horsemen had, in addition to their military functions, important duties in religious feasts, processions, and in athletic games. There were, however, Athenians, who, like Xenophon, proposed their admission into the cavalry. "While we give a share to foreigners," argues Xenophon, "of other privileges which it is proper to share with them, we would be likely to render them better disposed towards us and increase the strength and greatness of our country if we gave them admission also into the cavalry."⁸ Whilst Athens employed her metoecs

¹ Thuc. ii. 13; iv. 90.

² Schoemann, *op. cit.* vol. ii. p. 53.

³ See P. Guiraud, *L'impôt sur le capital à Athènes*, in *Revue des deux mondes*, Paris, Oct. 15, 1888.

⁴ Cf. Gilbert, *op. cit.* vol. i. p. 345; and C. Lécivain, *s.v. Epidosis*, in Daremberg-Saglio, *op. cit.*

⁵ See Clerc, *op. cit.* pp. 46 seq.

⁶ Thuc. v. 90.

⁷ Thuc. viii. 22.—On the *perioeci*, see *infra*. p. 178.

⁸ *De vectig.* ii. 5: Καὶ μεταδιδόντες δ' ἂν μοι δοκοῦμεν τοῖς μετοίκους τῶν ἄλλων ὄν καλὸν μεταδιδόναι καὶ τοῦ ἵππικοῦ εὐνουστέρους ἂν ποιεῖσθαι καὶ ἅμα ἰσχυροτέραν ἂν καὶ μείζω τὴν πόλιν ἀποδεικνύειν.—Cf. Hipparch. ix. 6.

ordinarily as a reserve force in the army, Sparta was accustomed to place her perioeci ungenerously in the front rank in war.

In the Athenian navy the position of the metoecs was more important, as they formed part of the regular service.¹

Position in the navy.

As to religion, foreigners in general enjoyed the free exercise of their national worship—a favour usually conceded by special authorization.² In the fourth century, B.C., there were numerous foreign religions and associations in Athens. Some were allowed to exist on sufferance, others received formal permission. In the following century, many oriental religious systems had obtained a footing in Greece. Metoecs were excluded from the priesthood (as from the magistracies)—τὸν ξένον καὶ μετοίκον οὐτ' ἀρχὰς ἀρχειν οὐθ' ἱερωσύνην κληρούσθαι . . . ;³ but certain privileges were extended to them in connection with the city's religious practices. Subject to certain restrictions, they could share in the public and private sacrifices, and were allowed to take part in the public feasts⁴ and processions of the Bendideia and of the Panathenaea.⁵ “Le métèque a le droit d'invoquer pour lui les dieux de la cité, il ne peut les invoquer au nom de la cité et pour elle.”⁶ Probably they were allowed in some cases to be initiated into the mysteries; as a general rule, strangers were prohibited therefrom,—μηδένα ξένον μύειν,⁷—but in this phrase the word ξένος is perhaps used in reference to non-domiciled aliens,—a supposition which seems to be supported by many texts (of which examples have already been given) containing the word μέτοικος as well as ξένος when it is intended that the application should extend also to

Foreigners and practice of their religion.

¹ Cf. Clerc, *op. cit.* p. 71.

² See P. Foucart, *Des associations religieuses chez les Grecs . . .* (Paris, 1873), and Clerc, *op. cit.* pp. 118 seq.

³ Demosth. c. *Eubulid.* 48.

⁴ Demosth. *In Neaer.* 85.

⁵ Cf. Schenkl, *De metoecis Atticis*, *loc. cit.* pp. 204 seq.

⁶ Clerc, *op. cit.* p. 150.

⁷ *Corp. jur. Att.* 34.

the former class. In any case, this is submitted merely as a conjecture, especially so as *ξένος* is often used to include the *μέτοικος*.

Whether humiliating functions were imposed on metoecs.

It has been held by several writers that certain humiliating functions were imposed on metoecs in the city's religious feasts and processions. "Rien ne prêtait davantage," says Sainte-Croix,¹ "à de pareils sarcasmes que les fonctions auxquelles, dans les fêtes religieuses, on avait voué ces étrangers." In the Panathenaic processions they acted as *σκαφηφόροι*² (*i.e.* carrying for their patrons certain skiff-shaped sacrificial vessels filled with cakes), their wives as *ὕδριαφόροι* (carrying pitchers for the wives of the citizens), and their daughters as *σκιαδηφόροι* (carrying parasols over the heads of the Athenian women). About the middle of the third century, A.D., Aelianus³ described these functions as servile; and this opinion has often been adopted in modern times, as, for example, by Boeckh, who says these duties were "geringe und ehrenrührige Dienste,"⁴ by Hermann, who makes use of a similar expression—"die erniedrigenden Gebräuche,"⁵ by A. Mommsen, who says the metoecs, clad in red livery as required by law, were also compelled to wait on the Athenians at their common meals.⁶ But in spite of these adverse

¹ *Mémoire sur les métèques*, loc. cit. p. 182.

² Harpocration, s.v. *σκαφηφόροι*; Pollux, iii. 55.

³ *Variae historiae*, vi. 1: 'Αθηναῖοι δὲ ὕβρισαν καὶ ἐκείνην τὴν ὕβριν . . . τὰς γοῦν παρθένους τῶν μετοίκων σκιαδηφορεῖν ἐν ταῖς πομπαῖς ἡνάγκαζον ταῖς ἐαντῶν κόραις τὰς δὲ γυναῖκας ταῖς γυναῖξί, τοὺς δὲ ἄνδρας σκαφηφορεῖν.

⁴ A. Boeckh, *Die Staatshaushaltung der Athener*, 2 Bde. (Berlin, 1886), vol. i. p. 624.

⁵ K. F. Hermann, *Lehrbuch der griechischen Antiquitäten*. Ed. by H. Blümner and W. Dittenberger (Freiburg i. B. 1889, etc.), vol. i. § 115.

⁶ *Heortologie—Antiquarische Untersuchungen über die städtischen Feste der Athener* (Leipzig, 1864), p. 180: "Die Metöken nämlich mussten, gekleidet in Roth als der gesetzlich bestimmten Livrée, hinter ihren Patronen, den Bürgern, Gefässe hertragen, gefüllt mit Kuchen und

opinions one fails to see that such duties were of so humiliating a character, especially when one remembers the comparatively extensive and important privileges conferred on the domiciled aliens. There is no cogent evidence to show that they were compelled by law to perform these functions; probably their services were gratuitously offered to their patrons, in view of the protection they received. Of course, aliens were not, in any case, considered on the same footing as citizens; but that does not mean they were constantly subjected to humiliation and oppression. The Athenians were glad to have them in their midst, and actually held out inducements to alien immigrants, who were always allowed to depart again whenever they pleased. And this condition of things is by no means consistent with the views expressed above. As to the carrying of the parasols, Wilamowitz-Möllendorff¹ argues that they were carried in honour of Athena, and that Aelianus was mistaken in supposing them to have been for the convenience of the Athenian ladies,—an argument which is not at all devoid of plausibility.

Metoece and other foreigners were under the jurisdiction of a special magistrate, the polemarch, *πολέμαρχος*, who tried only private suits, *δίκαι ἰδίαί*, and not public actions, *δίκαι δημοσίου*. He also heard appeals from the decisions of the arbitrators, *διαιτηταί*. In a good many cases, metoece could appear in person, and address the court. They were liable to give security in private² as well as in public³ actions,—from which liability citizens were exempt, excepting a few cases of the *δίκαι δημοσίου*. In regard to commercial cases (apart from specific conventions arranging otherwise) the domiciled aliens were practically assimilated to Athenian citizens. Thus, they were subject to the jurisdiction of the *ναντοδίκαι*, judges

Foreigners and jurisdiction.

Commercial cases.

Opferbrot und bald aus Erz bald aus Silber gearbeitet"; and p. 196 : "Das souveräne Volk sass zu Tisch und liess sich von seinen Beisassen das Brot und den Kuchen reichen."

¹ *Loc. cit.* p. 220. ² Isocrat. *Trapezit.* 12. ³ Lysias, *c. Agor.* 23.

Criminal cases. of the Admiralty Court, the *θεσμοθέται*, the six junior archons who heard causes assigned to no special court, and the *εἰσαγωγεῖς*, the magistrates who received informations and brought the case into court.¹ In criminal matters also they were on the same footing as citizens, except that in the case of metoecs, no distinction seems to have been made between involuntary homicide, *φόνος ἀκούσιος*, and wilful, premeditated murder, *φόνος ἐκ προνοίας*, and also that the penalty inflicted on them, after having been found guilty of this crime, was usually more severe.

Metoecs under protection.

Both in and (what is more remarkable) out of Athens, the metoecs were placed under the official protection of the Athenian people.² That the tie established between the State and the domiciled strangers was by no means of a precarious nature is clearly shown by the fact that even when they left Athens temporarily to travel, or reside abroad, their interests, both in reference to their persons and their property, were safeguarded by the Athenian government.³

Rewards and privileges to metoecs.

From time to time they received various rewards and privileges. Some of these were of the nature of distinguished honours, *e.g.* a formal official eulogy and bestowal of a laurel wreath, as in the case of Phidias of Rhodes, a public physician,⁴ decrees in favour of Zeno of Citium, the founder of the Stoic philosophy, the right to appear before the public assembly (*πρόσδοος*), granted, for example, to Eucles, a herald,⁵ and to Nicandros and Polyzelos, exemption from the polemarch's jurisdiction and permission to institute public actions, as extended to

¹ Cf. Demosth. *Exceptio adv. Pantaenetum*, 33 : οἱ δὲ νόμοι καὶ τούτων διδῶσι τὰς παραγραφὰς ἀντιλαγχάνειν, περὶ ὧν οὐκ εἰσὶν εἰσαγωγεῖς.

² Cf. Clerc, *op. cit.* pp. 188 *seq.*

³ *Corp. inscrip. Att.* iv. 27 a ; P. Foucart, *Mélanges d'épigraphie grecque* (Paris, 1878), 5 ; and cf. W. Dittenberger, *Sylloge inscriptionum Graecarum*, 3 vols. (Leipzig, 1898-1901), 348.

⁴ *Corp. inscrip. Att.* ii. add. nov. 256 b.

⁵ *Corp. inscrip. Att.* ii. 73.

the Acharnians who took refuge in Athens after the battle of Chaeronea,—*διδόναι δίκας καὶ λαμβάνειν καθάπερ Ἀθηναῖοι*.¹ Amongst the positive privileges conferred (which never included *ἐπιγαμία*) were *ἰσοτέλεια*,² equality with citizens as to taxes and tributes, thus raising the status of metoecs to that of *ἰσοτελεῖς*, and *προξενία*,³ raising their status to that of *πρόξενοι*; and generally accompanying these privileges was the right to acquire property in land and houses,—a right, moreover, which might be made hereditary.⁴ Further, metoecs, in some rare cases (and proxenoi, more often) were exempted from the public burdens (*ἀτέλεια*), for example, from the *μετοίκιον*,⁵ or from the *λειτουργίαι*,⁶ or from the *εἰσφορά*.⁷ Hence, it would appear that occasionally metoecs were actually treated, in regard to certain matters, with greater favour than citizens themselves.⁸

As to the more privileged class of *ἰσοτελεῖς*, we find *Isoteles—their position.* no information in the classical texts on the exact nature of their position, and there is no agreement on the subject amongst the old lexicographers. Some of these⁹ assert that they were foreigners practically made citizens; but then they were still subject to the polemarch's jurisdiction, which did not concern citizens. Others,¹⁰ again, state that they were foreigners admitted to all rights of citizenship except those of a purely political nature; but they were, in fact, not allowed *ἐπιγαμία*.¹¹

¹ *Corp. inscrip. Att.* ii. 121, ll. 26 *seq.*, and cf. the restoration of the text suggested by Schubert, *De proxenia Attica* (1886), p. 55.

² See *infra*, pp. 173 *seq.*

³ See *supra*, pp. 147 *seq.*

⁴ *Corp. inscrip. Att.* ii. 41.

⁵ *Corp. inscrip. Att.* ii. 27.

⁶ Demosth. *c. Leptin.* 18.

⁷ *Ibid.* 19 *seq.*; and cf. P. Monceaux, *Les proxénies grecques* (Paris, 1886), p. 99.

⁸ Cf. Clerc, *op. cit.* pp. 198, 199.

⁹ E.g. Schol. ad Demosth. *c. Leptin.* 466. 6; Suidas, *s.v.* Ἴσοτελεῖς.

¹⁰ E.g. Ammonius, Ptolemaeus, Chemnus, and others.

¹¹ This is also the view of R. Dareste, *Plaidoyers civils de Démosthène* (Paris, 1875), i. p. 311,—though it must be admitted that there are no definite texts in support of the statement.

(apart from specific decrees, which were very rare indeed, conferring the right of intermarriage). Probably the truth is that the isoteles were simply metoecs, free from the special taxation incidental to the latter,—so that they were assimilated to citizens not on the basis of the general rights of citizenship, but on the basis of the financial burdens arising therefrom.¹ This was a special honour,² and it was possible, by means of a specific decree, to make it hereditary.³

The isoteles are placed by Aristotle in an intermediate position between that of the metoecs and that of the proxenoi. Thus, discussing the functions of the polemarch, he says: "The private suits which he gives permission to bring are those to which the parties are metoecs, isoteles, or proxenoi."⁴

Limited
number of
isoteles.

The number of isoteles appears to have been very restricted. Thus out of a number of nearly 2,700 epitaphs found in Attica, only twelve were those of isoteles.⁵

Grant of
ισοτέλεια.

The honour and privileges of *ισοτέλεια* were sometimes granted to foreigners, other than metoecs, who consented to work in the mines,⁶ sometimes also to proxenoi,⁷ and probably even to cities and entire peoples,⁸

¹ Cf. Hesychius, s.v. Ἰσοτελεῖς: Μέτοικοι ἴσα τοῖς ἀστοῖς τέλη διδόντες; Harpocration, citing Lysias as to exemption from the *metoikion*, τοῦ μετοικίου ἄφαισις; and Theophrastus as to exemption from other taxes of metoecs, καὶ τῶν ἄλλων ὧν ἔπραττον οἱ μέτοικοι ἄφαισιν εἶχον.—See also the decree, 363-2 B.C., in favour of Astyocrates who, having been expelled from Delphi by the Amphictyons, took refuge in Athens,—*Corp. inscrip. Att.* ii. 54.

² As shown in funeral inscriptions and in official documents,—cf. *Corp. inscrip. Att.* ii. 616; ii. 3. 1333; ii. 3. 2723-2734; ii. 279, 334.

³ *Ibid.* ii. 3. 2724.

⁴ δίκαι δὲ λαγχάνονται πρὸς αὐτὸν ἰδῆαι μὲν αἱ τε τοῖς μετοίκους καὶ τοῖς ἰσοτελεῶσι καὶ τοῖς προξένοις γιγνόμεναι (*Athenian Constitution*, 58); cf. Pollux, viii. 91.

⁵ Cf. Clerc, *op. cit.* p. 210.

⁶ Xenoph. *De vectig.* iv. 12.

⁷ *Corp. inscrip. Att.* ii. 48.

⁸ *Corp. inscrip. Att.* ii. add. 97 c; and cf. Schenkl, *op. cit.* p. 222.

—though in the latter case the immunity was only partial. However, in spite of these privileges the juridical position of the isoteles, as M. Clerc points out,¹ was fundamentally the same as that of the metoecs. “Ni les avantages conférés de plein droit par l’isotélie, ni ceux qui s’y ajoutaient souvent, ne changeaient au fond la condition légale des isotèles, qui, à vrai dire, ne cessaient pas d’être des métèques.” Boeckh distinguishes them from metoecs in consideration of the fact, amongst other reasons, that they were not under the necessity of having a *prostates*. “Da sie gewiss keinen Patron (προστάτης) brauchten, welches ohne Zeugniß sich vom selbst versteht, so konnten sie unmittelbar mit dem Volke und den Behörden verhandeln, ohne jedoch deshalb in der Volksversammlung stimmen zu können.”² No authorities are given for this statement, but probably that was the case.

Isoteleia was conferred only by a decree of the people. How it was conferred. In the case of Euxenides of Phaselis, for example, it runs to this effect: “Whereas Euxenides has shown himself well-disposed towards the Athenian people, that he has regularly paid all the *eisphorai* imposed on the metoecs by the people, that in the late war he voluntarily equipped twelve sailors, that recently he gratuitously supplied cords for the catapults, that he zealously fulfilled all that he was ordered by the *strategoi* and the *taxiarchi*, and that in everything he has shown himself the friend of the Council and of the Athenian people . . .”³

¹ *Op. cit.* p. 209.

² *Die Staatshaushaltung der Athener*, vol. i. p. 627.

³ *Corp. inscrip. Att.* ii. 413; Rangabé, *Antiq. hellén.* 479. (From an inscription of about 200 B.C.)

... ἐ[π]ειδὴ Εὐξ[έν]ιδης διατελεῖ [ε]ὔνοους ὦν τ[ὴ] δῆμῳ
τῷ Ἀθην[α]ίων καὶ τὰς τε εἰσφορὰς ἀπ[ά]σ[ας] ὅσας
ἐψ[ή]φισται ὁ δῆμος ἐ[ἰ]σενεγκεῖν τοὺς μετοίκους [ε]ὐτάκτως
ἐ[ἰ]σενήνοχεν καὶ ἐν τῷ πολέμῳ τῷ πρότερον ἐβελοντῆς
[ν]αύτας δώδεκα ἐνεβίβασεν, καὶ ἰνὺν εἰς τοὺς καταπάλτας
ν[ε]ῦ[ς] ρὰς ἐπέδωκεν καὶ ὅσα ἐπετάχθη αὐτῷ ὑπὸ τῶν
στρατηγῶν | καὶ τῶν ταξιάρχων ἅπαντα προθύμως

Inferior classes
of Athenian
population.

Cleruchi.

Slaves.

Freedmen.

Relation of
metoecs to
these classes.

From the above considerations it is seen that the metoecs formed an inferior class of the stable population of Athens, but with certain distinctly recognized rights and obligations. The inferior section, as a whole, consisted of men of free origin and those of servile origin. The former included (in addition to the classes above mentioned) the κληρουχοι,¹ the natives of the regions where the cleruchi were established, and the allies,² of whom there were allies proper, ξύμμαχοι, and subject allies, ὑπήκοοι. Of servile origin were slaves, public (δημόσιοι)³ and private (χωρίς οἰκούντες),⁴ and freedmen.⁵ Cleruchi were, from a legal point of view, still Athenian citizens, absence from the city depriving them only of effective citizenship, in its political aspect.

To these different classes the metoecs bore a greater or lesser resemblance. Thus, like the cleruchi, many metoecs were members of two communities at once; both are often described as 'being settled in' (οἰκεῖν, οἰκούντες) Athens, in opposition to living in their own country; both could sacrifice to the Athenian divinities, and take part in the festivals of Parathenaia and Dionysia; but the metoecs were not entitled, as the cleruchi were, to be present at the public meals. Further, the metoecs resembled the allies in respect of the tribute levied; they resembled the slaves, in that certain duties were

ὑπηρέτηκεν, καὶ τὰ ἀ[λ]λα διατελεῖ φιλοτιμούμε[νο]ς
εἰς τὴν βουλὴν καὶ τὸν δῆμον τὸν Ἀθηναίων' . . .

and cf. *Corp. inscrip. Att.* ii. 360, for a similar example in the case of Hermaeos.

¹ Plutarch (*Flamin.* 2) uses the word κληρουχίαι to translate "coloniae civium Romanorum."—On the cleruchi, see P. Foucart, *Mémoire sur les colonies athéniennes au cinquième et au quatrième siècles* (in *Mémoires de l'académie des inscriptions et belles-lettres*, Paris, 1878, 1^{re} Série, t. iv. pp. 360 seq.).

² Cf. P. Guiraud, *De la condition des alliés pendant la première confédération athénienne* (in *Ann. fac. des lettres de Bordeaux*, t. v. pp. 168 seq.).

³ See E. Caillemer, in Daremberg-Saglio, *op. cit.* s.v. *Demosioi*.

⁴ Cf. Meier and Schoemann, *op. cit.* p. 751.

⁵ See Daremberg-Saglio, *op. cit.* s.v. *Apeleutheroi*.

imposed on them from which citizens were exempt ; and their position was analogous to that of the freedmen¹ (*ἀπελεύθερος*, emancipated slave, corresponding to the Latin *libertus*) in respect of taxation and the necessity to have patrons (who, in the case of the freedmen, were their former masters).²

In reference to the Roman institutions, the metoecs resembled the freedmen, the *ordo libertinorum*, rather than the *peregrini*, or the *incolae*,—at least, from the point of view of their juridical position. The *libertini* had not *connubium* (till Augustus), as the metoecs had not *ἐπιγαμία*. The Roman freedmen were not admitted into the legions, whereas the metoecs were enrolled in the ranks of the hoplites, though not in the cavalry. Both were debarred from the *ius honorum* (the capacity to hold certain public offices), from priesthood, and, as a rule, from access to the senate, or *βουλή*, as the case may be.

Relation of metoecs to the Roman *libertini*.

Differences of opinion have been expressed as to the exact relationship of metoecs to the State. Thus Wilamowitz-Möllendorff holds that they were really 'clients' of the State, as distinguished from those of individuals. "Die Metoeken Clienten sind, aber nicht Clienten eines einzelnen Atheners, sondern des Volkes der Athener, als Mitbewohner Athens Mitpfleglinge Athenas, Quasibürger."³ This statement is founded on a passage from Aeschylus,⁴ where Pelasgos, King of Argos, receiving the Danaides, says he will be their *prostates*,—

Relationship of metoecs to the State.

... προστάτης δ' ἐγώ,
ἀστοί τε πάντες...

whence the Danaides are considered metoecs by the German writer. But it is extremely doubtful whether the tragedian here uses the word *προστάτης* in its technical sense. It is more probable that it is employed in this

¹ In Plato's *Laws*, xi. 915 there is a curious provision that freedmen, like metoecs, are not to remain in the city more than twenty years.

² Cf. A. W. Heffter, *Athenäische Gerichtsverfassung* (Cöln, 1822), p. 8.

³ *Op. cit.* p. 246.

⁴ *Suppl.* 964.

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passage in the sense of protector or champion,¹ as is done elsewhere.²

Final definition
of metoecs.

On the whole the most exact definition of metoecs is that given by Clerc :³ " Les métèques étaient des étrangers, les uns d'origine servile, les autres d'origine libre, fixés à Athènes, soit pour un temps, soit définitivement, que la cité faisait participer à ses charges, leur octroyant en retour des droits positifs, et à qui elle ouvrait même, dans une certaine mesure, ses cadres ; de sorte que, sans être citoyens, ils faisaient partie intégrante de la cité."

Classes of the
Spartan
population.

Helots.

Perioeci.

As to Sparta we find three different classes constituting its population,—full citizens, the dependent perioeci, (περίοικοι), and the serfs or helots (ἐἰλωτες). As in the case of Athenian slaves, helots were sometimes emancipated in recognition of military or other services rendered to the State ; and from them or their children a new class arose, *neodamodes* (νεοδαμώδεις,⁴ from νέος, new, recent, δᾶμος, δῆμος, the people ; hence, 'newly enfranchised'), who did not, however, obtain full citizenship. The sons of Spartans and helot women were designated μόθακες or μόθωνες, some of whom were endowed with the entire body of civic rights. The perioeci (largely analogous to the Athenian metoecs), whose position to some extent resembled the Teutonic vassalage, had to perform certain services, to pay

¹ Cf. Clerc, *op. cit.* p. 297.

² Cf. Aeschyl. *Theb.* 408, where he speaks of the 'defender of the gateway,'

... ἀντιτάξω προστάτην πυλωμάτων,
and cf. similar usage, *ibid.* 797-8—

... καὶ πύλας φερεγγύοις
ἐφραξάμεσθα μονομάχοισι προστάταις.

Similarly, Sophocles uses the word as 'protector,' *Oed. Tyr.* 303 ; and cf. Ἀπόλλωνα προστάταν (*Trach.* 209), in reference to Apollo.

³ *Op. cit.* p. 297.

⁴ Pollux, iii. 83.—Cf. Thuc. vii. 58 ; Xenoph. *Hellen.* iii. 3. 6 ; v. 2. 24.

special taxes and dues,¹ and to serve in the army as heavy-armed troops. They were not admitted to the Spartan public assemblies,—in any case, attendance would have been impracticable owing to their distance from Sparta. But in the communities to which they belonged, they probably exercised the rights of citizenship.² They engaged in various arts and crafts, and in commercial and trading pursuits, which the Lycurgan legislation had forbidden Spartans to follow.³ Though politically inferior they were not subjected to oppressive measures. As in the case of the metoecs, sometimes the perioeci were entrusted with high functions. It has been calculated that there were in Laconia over 60,000 members of this class ; but it would seem, from various considerations, that the estimate is probably too high.

¹ Strabo, viii. p. 365 ; Plato, *Alcib.* 123 A.

² Herodot. vii. 234 ; cf. Strabo, viii. p. 362.

³ Plut. *Lycurg.* 4.

CHAPTER VIII

NATURALIZATION IN ATHENS¹—CERTAIN IMPORTANT ELEMENTS OF PRIVATE INTERNATIONAL LAW IN GREECE

In earlier times
naturalization
difficult.

OWING to the close relationships between the religion of the ancient State and citizenship, and to the exclusiveness of such religion, and owing also to the deeply rooted racial pride (which questions have already been considered), naturalization was made extremely difficult, and for a long time was very rarely resorted to. In the earlier epochs of ancient history, even very long domicile of an alien was not regarded as carrying with it any legal rights and civic privileges; they were not even thought to have been bestowed gratuitously. Subject to the restrictions already indicated, a resident foreigner on commission of an offence was, according to the earlier theory of the municipal law, punishable summarily and without proper trial; the State did not admit any obligation on its part to mete out strict justice to him, nor any right in him to claim it. But there is no doubt that actual practice very rarely followed the principles of such uncompromising theory. Plato's provision in his *Laws* was not merely speculative or visionary, as being applicable only to a Utopian polity, but it truly repre-

Modifications
in practice.

¹ On this subject see especially E. Caillemer, *La naturalisation à Athènes* (Paris, 1880); the same writer's article in Daremberg-Saglio, *op. cit.* s.v. *Demopoietos*—practically a reproduction of the first (to which writings a portion of the present chapter is much indebted); E. Szanto, *Das griechische Bürgerrecht* (Freiburg i. B. 1892); Clerc, *op. cit.* pp. 221 *seq.*; A. Philippi, *Beiträge zu einer Geschichte der*

sented the spirit and conduct of his age.¹ "If he [the citizen] thinks that some stranger has struck him out of wantonness or insolence, and ought to be punished, he shall take him to the wardens of the city, but let him not strike him . . . and let the wardens of the city take the offender and examine him, not forgetting their duty to the God of strangers." Later, special legal machinery was established in Greece, as in Rome, to deal with differences arising out of transactions of aliens. In process of time various relaxations were further introduced; economic and political interests gradually prevailed over religious feelings, ethnic considerations, and traditional observances. And certain formalities came to be devised and conditions laid down, the fulfilment of which placed the alien dwellers practically on the same footing with citizens. But, as Aristotle argued,² neither residence alone nor the possession of legal rights along with it could suffice to constitute citizenship.

Gradual
relaxations.

Athens was the most cosmopolitan city of Greece, and granted naturalization the most freely. On the other hand, Sparta was one of the most exclusive States, and conceded it very rarely. It is stated by Herodotus³ that till his time Tisamenus and Hegias were the only individuals who received Lacedaemonian citizenship; but probably Herodotus here refers only to foreigners in the strict sense, for helots were often admitted to citizenship, thus becoming 'new citizens' (*νεοδαμώδεις*).⁴ Even then admission was not so rare. Herodotus himself says⁵

Athens—a
cosmopolitan
city.
Spartan
exclusiveness.

attischen Bürgerrechts (Berlin, 1870); H. Buermann, *Animadversiones de titulis Atticis, quibus civitas alicui confertur vel reintegratur* (Leipzig, 1879).

¹ix. 879 D: ξένον δὲ ἂν ἀσελγαίνοντα καὶ θρασυνόμενον ἑαυτὸν τύπτοντα οἴηται δεῖν κολασθῆναι, λαβὼν πρὸς τὴν ἀρχὴν τῶν ἀστυνόμων ἀπαγέτω, τοῦ τύπτειν δὲ εἰργέσθω . . . οἱ δ' ἀστυνόμοι παραλαβόντες τε καὶ ἀνακρίναντες, τὸν ξενικὸν αὖ θεὸν εὐλαβούμενοι . . .

²*Polit.* iii. 1. 3.

³ix. 35 (as to Tisamenus the Elean and his brother): Μοῦνοι δὲ δὴ πάντων ἀνθρώπων ἐγένοντο οἱ τοὶ Σπαρτιήτησι πολιῆται.

⁴Thuc. vii. 58.

⁵iv. 145.

that the Minyae of Orchomenus were received as citizens,—but were perhaps admitted among the perioeci. With such admission may be compared the reception of the Sabine refugees by the Roman people.¹ Tyrtaeus, as reported by Plutarch, was awarded Spartan citizenship. Foreign slaves, too, brought up as foster-children (τρόφιμοι) in the house of a Spartan seem sometimes to have attained the citizen rank.² And according to Aristotle there is a tradition that the ancient kings of Sparta were in the habit of giving to strangers the rights of citizenship.³

Naturalization
in Megara rare.

The Megarians boasted that they extended this privilege only to the gods. When they offered citizenship to Alexander, they did so, as they alleged, on the grounds that he was a god,—having been thus saluted by the oracle of Ammon; and they pointed out to him that they had granted citizenship to no foreigner except Hercules.⁴ The same claim is referred by Seneca to the Corinthians.⁵

Sometimes
twofold
citizenship
allowed.

The principle is firmly established to-day that no individual can owe allegiance to more than one sovereign power at the same time, that he cannot be a citizen of more than one State at one and the same moment. This rule was also laid down in Roman law. But the Greeks, if we judge from their practice, frequently allowed the contrary. Cicero mentions with surprise that the Republics of Greece very often granted citizenship to individuals, who also remained citizens of their own respective countries; so that it became possible for people to become citizens of many States,—“multarum

¹ Liv. ii. 16.

² Xenoph. *Hellen.* v. 3. 9.

³ *Polit.* ii. 9. 17: λέγουσι δ' ὡς ἐπὶ μὲν τῶν προτέρων βασιλέων μετεδίδοσαν τῆς πολιτείας. . . .

⁴ Plut. *De unius in rep. dom.* 2.

⁵ *De benef.* i. 13: “Alexandro Macedoni, cum victor orientis animos supra humana tolleret, Corinthii per legatos gratulati sunt et civitate illum sua donaverunt. Cum risisset Alexander hoc officii genus, unus ex legatis, nulli, inquit, civitatem umquam dedimus alii quam tibi et Herculi.”

cives civitatum." According to the legislation of Solon, however,—as is pointed out by Plutarch,—no foreign individuals were permitted to become full citizens in Athens, unless they had either been exiled for life from their native cities, or had removed voluntarily to Athens along with their entire families with a view to practising there their trades and professions,—*παρέχει δ' ἀπορίαν καὶ ὁ τῶν δημοποιήτων νόμος, ὅτι γενέσθαι πολίταις οὐ δίδωσι πλὴν τοῖς φεύγουσιν ἀειφυγία τὴν ἐαυτῶν ἢ πανεστίοις Ἀθήναζε μετοικιζομένοις ἐπὶ τέχνῃ.*¹ Plutarch adds that the object of this policy was not so much to deny citizenship to other classes of people, as to assure those mentioned of a safe refuge in Athens, since it was thought they would become good and faithful citizens on the ground that the former had been banished from their own country, and the latter had deliberately abandoned it to find a new abode.² These conditions, however, were not always strictly observed.

There are several cases where Athenian citizenship was offered to distinguished persons, who refused it. Thus Atticus, who removed to Athens in 85 B.C. and lived there a long time, was very fond of the Athenians, but did not accept the proffered honour.³ In earlier times the Stoic philosopher Zeno of Citium in Cyprus, and Cleanthes of Assos in Troas, to mention no others, refused Athenian citizenship, as they thought that acceptance would imply injustice and ingratitude to their native countries; ⁴ on the other hand, Chrysippus of Soli in Cilicia accepted it,⁵ though he made no use of it.

Refusal of
Athenian
citizenship.

As to the conditions of naturalization, and the reasons for which citizenship was bestowed on aliens (though it must be remembered that very often the main reason

Conditions of
naturalization.

¹ *Solon*, 24.

² *Ibid.*

³ *Corn. Nep. Atticus*, iii. 1: "Quo factum est ut huic omnes honores quos possent publice haberent civemque facere studerent; quo beneficio ille uti noluit."

⁴ *Plut. De Stoic. repug.* iv. 1-2.

⁵ *Ibid.* ii. 1.

Bestowed for
good offices or
services.

from the point of view of the State was scantiness of population, *ὀλιγανθρωπία*, or *ὀλιγανδρία*), the decrees usually speak of the grantee's good offices towards Athens (*ἀνδραγαθία*, 'manly virtue,' *εὐνοία*, good-will), his benevolence, his devotion and generosity to her; ¹ and in some cases actually specify certain particular services rendered, especially in time of need. Thus, Demosthenes relates that the honour was conferred on Peridiccas of Macedon for consummating the defeat of the Persians after the battle of Plataea, ² on Meno of Pharsalus for giving twelve talents and other assistance to make war against Eion. ³ Elsewhere, ⁴ however, Demosthenes says that neither of them received full citizenship, *πολιτεία*, but only immunity from the various charges (*ἀτέλεια*) imposed on non-citizens. Again, Andoleon, King of the Peonians, was admitted in recognition of his having supplied wheat to the Athenians at a time of crisis, ⁵ 286 B.C., and Evenor, for his medical services to the citizens of Athens. In the case of the latter the decree runs somewhat as follows: ⁶ "Whereas Evenor the physician has in the past manifested a benevolent disposition towards the city and people, and has made himself useful by his art and cured several of the citizens and aliens, who inhabited the city . . . (commendation and crowning with a green branch) . . . let him and his descendants be Athenians, and let him be

¹ Cf. Demosth. *c. Neaer*. 89 (before cited).

² *c. Aristocr.* 200.

³ *Ibid.* 199.

⁴ *De rep. ord.* 23.

⁵ *Corp. inscrip. Att.* ii. no. 312, p. 136.

⁶ *Corp. inscrip. Att.* ii. no. 187, p. 87; cf. Rangabé, *op. cit.* ii. p. 35, no. 378:

... ἐπειδὴ Εὐήνωρ ὁ ἰατρός πρότερόν τε [ε-
ὔνοους μὲν ἦν τῇ πόλει καὶ τῷ δήμῳ καὶ [χ-
ρήσιμον ἑαυτὸν πα]ρέσχηκεν κατὰ τὴν τέχ[ν-
ην, πολλοὺς δὲ ἰάτο] τῶν πολιτῶν καὶ τῶν ἄλ[λ-
ων τῶν ἐνοικούντων] τῇ πόλει...
... εἶναι δὲ αὐτὸν Ἀθ[ηναίων καὶ ἐκγό-
νους, καὶ ἐξεῖναι αὐτῷ] γράψασθαι φυλ-
ῆς, δήμου καὶ φρατρίας ἧς ἂν] βούληται ὁ [ια-
τρός.

permitted to be inscribed in the tribe, deme, and phratry that he may choose."

Occasionally, the honour was also conferred for certain distinctions, or for certain acts of a different nature from those mentioned. Thus Anacharsis, a Scythian prince, is said to have been made an Athenian in the time of Solon, and was admitted to the mysteries,¹ in spite of his being a 'barbarian,'—τὰ τελευταῖα καὶ ἐμνήθη μόνος βαρβάρων Ἀνάχαρσις, δημοποίητος γενόμενος. . . . And Pyrrho, a disciple of Plato, and the founder of the sceptical school of philosophy, was likewise proclaimed a citizen for having slain Cotus, tyrant of Thrace,—Ἀθηναῖοι δὲ καὶ πολιτεία αὐτὸν ἐτίμησαν καθά φησι Διοκλῆς, ἐπὶ τῷ Κότῳ τὸν Θράκα διαχρήσασθαι.² A very interesting example is the decree of B.C. 369-368, conferring certain honours on Dionysius I. of Syracuse, who had been the ally of Sparta. It states that the Athenians publicly praise him for his zeal in maintaining the provisions of the peace of Antalcidas, and grant him and his sons the rights of citizenship, on account of their good disposition towards Athens :

νέσ]αι μὲν Διονύσιον τὸ[ν] Σικελ[ίας] ἀρχ-
οντ]α κ[α]ὶ τοὺς υἱεὺς τοὺς [Δι]ονυ[σίου] . . .
... δὲ εἰ[ς] τὸν ἄνδρ-
ες] ἀγαθοὶ [π]ερὶ τὸν δῆμον τὸν Ἀ[θηναίων].³

Many other similar instances can be found.⁴

From time to time there were serious abuses in the bestowal of these privileges. About the middle of the fourth century Demosthenes, in one of his orations, exclaimed that the gift of citizenship had been deprived of its ancient value, and had been dragged down to the mud, . . . δωρεὰ προπεπηλάκισται καὶ φαύλη γέγονεν. . . .⁵

¹ Lucian, *Scythia*, 8.

² Diog. Laert. ix. 65.

³ See Hicks, *Gr. Inscript.* no. 108.

⁴ For additional examples, see H. M. de Bruyn de Neve Moll, *De peregrinorum apud Athenienses conditio* (Dordraci, 1839), pp. 29 seq.

⁵ c. *Aristocr.* 201.

At about the same period Isocrates complained of the great prodigality in giving to aliens the title of Athenian.¹ But the allegations of the Athenian orators as to the extravagance in the practice of naturalization during the fourth century are, no doubt, rhetorically exaggerated; it really commenced after the time of Alexander. In some instances citizenship was given, at the time of Greek decadence, to many strangers, of whose good disposition the Athenians had no assurance;² in other instances, for trifling reasons, as in the case of Aristonicus of Carystus,³ because he was a skilful ball-player. It was given to Chairephilos, a famous salt-fish merchant, and to his three sons, Pheidon, Pamphilos, and Pheidippos.⁴ The comic poets taunted the Athenians that they had shown such great generosity on account of their love of salt-fish,⁵ but very probably it was owing to the fact that Chairephilos had supplied the Athenians with provisions at a time of scarcity, 326-5 B.C.⁶

Athenian
practice under
Roman empire.

Later, under the Roman empire, the Athenian practice appears to have sometimes degenerated into a traffic. Thus, a Greek historian, writing in the latter part of the second century, A.D., says that Augustus prohibited the Athenians from selling their citizenship, . . . ἀπηγόρευσε σφισι μηδένα πολίτην ἀργυρίου ποιέσθαι;⁷ and Tacitus, about a century before this, stated that when Piso entered Athens he delivered a public speech, declaiming against the inhabitants, saying that there were no more Athenians, that the descendants of heroes had been replaced by a vile, heterogeneous mass, the scum of various nations, “. . . conluviem illam nationum comitate nimia coluisset.”⁸

¹ *De pace*, 50.

² Demosth. *c. Aristocr.* 200 *seq.*

³ Athenaeus, *Deipnosophistae*, i. 34: ὅτι Ἀριστόνικον τὸν Καρύστιον, τὸν Ἀλεξάνδρου σφαιριστήν, Ἀθηναῖοι πολίτην ἐποίησαντο διὰ τὴν τέχνην καὶ ἀνδριάντα ἀνέστησαν.

⁴ Dinarchus, i. 43; cf. Hyperides, frag. 222 in *Orat. Att.* ii. 427.

⁵ *Fragm. com. Graec.* iii. 385, 413, 482.

⁶ See A. Schaefer, *Demosthenes und seine Zeit*, 3 Bde. (Leipzig, 1885-7), vol. iii. p. 296, note 4.

⁷ Dion Cassius, liv. 7.

⁸ Tacit. *Ann.* ii. 55.

There were also cases of naturalizing entire bodies of individuals. Thus, in the Peloponnesian war, after the destruction of Plataea, the Athenians offered its inhabitants citizenship, on the conditions that they accepted it at once, that they verified their nationality before a tribunal, and that they testified to their good disposition towards Athens.¹ Many Plataeans availed themselves of the offer and settled at Scione in the peninsula of Pallene.² In the last years of the war a number of metoecs in Athens received citizenship; and on the expulsion of the Tyrants by Thrasybulus in 403 B.C., following on the conclusion of the war, Cleisthenes enrolled amongst the Athenian tribes many metoecs and other foreigners,—but, as Aristotle points out, this was really a revolutionary measure.³ After the battle of Chaeronea, 338 B.C., when the independence of Greece was extinguished by Philip and Alexander, a number of metoecs were naturalized. Again, it is reported that in 406 B.C., after the battle of Arginusae, even the slaves who had served in the fleet were emancipated and awarded citizenship.⁴ Andocides asking the Athenians to confirm the decree, voted on the proposition of Menippus, which granted him a pardon, said: “I see you often give citizenship and considerable sums of money to slaves, and to foreigners of all kinds, when it

Naturalization
en masse.

¹ Demosth. c. *Neaer*. 89 seq., 104 seq.; cf. Isocrat. *Panathenaicus*, 94, and *Plataicus*, 52.

² Thuc. v. 32; Isocrat. *Panegy.* 109.

³ Aristotle, discussing the essential meaning of citizenship, and coming to the question whether a citizen *de facto* is also a citizen *de iure*, says it is difficult to settle it in the case of those who have been made citizens after a revolution,—ἀλλ' ἴσως ἐκείνο μᾶλλον ἔχει ἀπορίαν, ὅσοι μετέσχον μεταβολῆς γενομένης πολιτείας, οἷον Ἀθήνησιν ἐποίησε Κλεισθένης μετὰ τὴν τῶν τυράννων ἐκβολήν. πολλοὺς γὰρ ἐφυλέκτευσε ξένους καὶ δούλους μετοίκους (*Polis.* iii. 2. 3).

⁴ Hellanicus, quoted in Schol. ad Aristoph. *Ran.* 706. It is here stated that the slaves became Plataeans; the real fact, however, is they were granted land in the territory of Scione, which had been handed over to the Plataeans.

is shown they have done you a service. And you are wise in giving these rewards.”¹

Necessary
proceedings in
naturalization.

Now as to the formalities that were necessary in naturalization. First there was a preliminary vote of the people. If favourable, it was necessary to obtain a subsequent confirmation by at least six thousand votes, given by ballot, in order to render it valid (κύριος),—*ἔπειτ' ἐπειδὰν πεισθῇ ὁ δῆμος καὶ δῶ τὴν δωρεάν. οὐκ ἔα κυρίαν γενέσθαι τὴν ποίησιν, εἰ μὴ τῇ ψήφῳ εἰς τὴν ἐπιούσαν ἐκκλησίαν ὑπὲρ ἑξακισχίλιοι Ἀθηναίων ψηφίσωνται κρύβδην ψηφίζόμενοι. . . .*² Even after this proceeding the naturalized subject was liable to be deprived of his newly acquired right by the indictment *γραφὴ παρανόμων* directed against the mover of the decree, for bringing about the proposition of an unconstitutional measure. Thus the *βουλή*, a tribunal of five hundred members (later, six hundred) was empowered to reconsider a decree of the assembly after a twofold inquiry, and six thousand secret votes. Demosthenes says it would be tedious to enumerate all the cases of taking away citizenship after granting it on account of certain illegality or unworthiness; and amongst the later instances he mentions those of Pitholas the Thessalian and Apollonides the Olynthian, who were deprived of their citizenship by a Court of Justice after it had been granted to them by the assembly of the people.³

This account of Demosthenes, contained in a speech dated about the middle of the fourth century, is borne out by extant official texts of decrees.⁴

Resolution by
the people.

In the first place the people resolved as to whether there was a just cause for granting naturalization :

*εἶναι δ' αὐτὸν καὶ Ἀθηναῖον καὶ ἐγγόνους καὶ γράψασθαι φυλῆς καὶ δήμου καὶ φρατρίας ἧς βούλεται.*⁵

¹ *De reditu suo*, 23 : ὁρῶ δὲ ὑμᾶς πολλάκις καὶ δούλοις ἀνθρώποις καὶ ξένοις παντοδαποῖς πολιτείαν δίδοντας τε καὶ εἰς χρήματα μεγάλας δωρεάς, οἱ ἂν ὑμᾶς φαίνωνται ποιούντες τι ἀγαθόν. καὶ ταῦτα μέντοι ὁρθῶς ὑμεῖς φρονοῦντες δίδοτε.

² Demosth. c. *Neaer*. 90.

³ *Ibid.* 91.

⁴ Cf. Buermann, *op. cit.* (*passim*).

⁵ *Corp. inscrip. Att.* ii. 309.

After this the formal proposition is put to the vote :

τοὺς δὲ πρυτάνεις τοὺς τὴν εἰσιούσαν πρυτανείαν
πρυτανεύοντας δοῦναι περὶ αὐτοῦ τὴν ψῆφον
τῷ δήμῳ εἰς τὴν πρώτην ἐκκλησίαν.¹

About 320 B.C., if we may judge from the testimony of inscriptions, judicial examination was customary. At the time of Demosthenes' speech just referred to (*c. Neaeram*), viz. 340 B.C. approximately, the action *γραφὴ παρανόμων*, instituted by any citizen who found cause for objection, was more usual. So that we find that the intervention of the tribunals, at the instance of the *thesmothetae*, soon became a compulsory part of the procedure :

... εἰσαγαγεῖν δὲ τὴν δοκιμασίαν τοὺς θεσμοθέτας εἰς τὸ πρῶτον δικαστήριον κατὰ τοὺς νόμους.²

This became a general rule by the beginning of the third century, and a fixed rule about the year 287 B.C.

At about 250 B.C., the second vote in the assembly appears to have been discontinued, but the judicial examination (*δοκιμασία*) was still in force. Hence, the usual formula for naturalization at the middle of the third century is to this effect :

δεδοσθαι δὲ αὐτῷ... πολιτείαν... κατὰ τὸν νόμον, τοὺς δὲ θεσμοθέτας ὅταν... πληρῶσιν δικαστήριον εἰς ἓνα καὶ πεντακοσίους δικαστάς, εἰσαγαγεῖν αὐτῷ τὴν δοκιμασίαν... καὶ εἶναι αὐτῷ δοκιμασθέντι γράψασθαι φυλῆς καὶ δήμου καὶ φρατρίας ἧς ἂν βούληται.³

A century later we find that a new condition was required, namely, an express application by the candidate for the favour. The decrees speak of granting citizenship to the petitioner in pursuance of the law :

δεδοσθαι δὲ αὐτῷ καὶ πολιτείαν κατὰ τὸν νόμον αἰτησαμένῳ.⁴

It may be pointed out that the last words of this phrase are a conjectural restoration effected by analogy with the

¹ Cf. *Corp. inscrip. Att.* ii. 309.

² Cf. *ibid.*

³ Cf. *Corp. inscrip. Att.* ii. 395.

⁴ *Corp. inscrip. Att.* ii. no. 455, p. 234.

tenour of inscriptions relative to the granting, on petition being duly made, of the rights of proxenia, and of acquiring property in land and houses in the city :

δεδοσθαι δὲ αὐτῷ καὶ προξενίαν καὶ γῆς καὶ οἰκίας ἔγκτησιν αἰτησαμένῳ κατὰ τὸν νόμον,¹—

from which it is not unreasonably inferred that a similar condition was required in the case of the greater privileges of citizenship.²

Deposit of
official decrees.

The official texts of all such decrees were placed in the metroon (Μητροῶν), the temple of Cybele, which was near the council-chamber (βουλευτήριον), and served as a depository for the Athenian State-archives.

Effects of
naturalization.

The individual thus naturalized (δημοποίητος)³ was entitled to inscribe himself in whatever tribe, deme, and phratry he might choose;—γράφασθαι φυλῆς καὶ δήμου καὶ φρατρίας ἧς αὖ βούληται came to be the stereotyped formula in this respect. But there were probably certain restrictions as to the extent of choice permitted.⁴ There are various inscriptions of the fifth, fourth, and third centuries which show conclusively that the naturalized citizens were admitted into a phyle, deme, and phratry by virtue of the decree which bestowed the franchise on them.⁵

Hereditary
effect.

For a long time the privileges conferred by naturalization were not confined to the person of the δημοποίητος,

¹ *Corp. inscrip. Att.* ii. no. 423, p. 206 ; cf. no. 438, p. 214.

² Cf. Buermann, *op. cit.* p. 348.

³ With regard to the Athenian citizen population, a distinction was often specifically drawn between the naturalized citizens, δημοποίητοι, ποιητοί (Arist. *Polit.* iii. 1. 3), or δωρεᾶ πολῖται (by gift), and the natural-born citizens, φύσει or γένει πολῖται.—Cf. Demosth. *c. Steph.* 78.

⁴ As to the political *status* of the new citizens, especially with regard to their relation to the phratries, see the various theories stated by Philippi, *op. cit.* pp. 107 *seq.*

⁵ Cf. *Corp. inscrip. Att.* i. 59 (410-9 B.C.); ii. 54 (363-2 B.C.); ii. 121 (338-7 B.C.); ii. 300 (295 B.C.).—Apart from epigraphic evidence, see Buermann, in *Jahrbuch für classische Philologie*, 9th suppl. pp. 597 *seq.*

but were *ipso facto* extended to his children and direct descendants. Till the middle of the third century B.C., the decree, in this connection, was usually couched to this effect:

εἶναι δ' αὐτὸν καὶ Ἀθηναῖον καὶ τοὺς ἐκγόνους αὐτοῦ,

thus making no mention of the wife of the naturalized subject.¹

Children born before the act of naturalization became citizens along with their father, irrespective of their mother remaining alien or not.² Children born before naturalization.

If born after naturalization and by an Athenian mother they were certainly citizens by the common law; but if born after naturalization and by an alien mother, then, according to some documents, they remained aliens; but it appears, according to others, that they could be easily made citizens by a decree obtainable on a merely formal proceeding. If born after naturalization.

From the point of view of political rights, there was scarcely any difference between a natural-born Athenian and a naturalized Athenian. The main difference was that the naturalized citizen was debarred from the archonship and from priesthood.³ In the fourth century B.C., this incapacity was only personal, and did not descend to the children born of an Athenian mother in legitimate marriage;⁴ but in the previous century, this exemption applied equally to the children.⁵ Political status of naturalized subject.

With regard to civil rights, the naturalized citizen enjoyed full juridical capacity. It has been held, however, that he had not full marital authority (*κύριος*),—an inference which appears to have been drawn from the case of Pasion who married Archippe. But in this case the conclusion, if intended to possess general applicability, is untenable, as Caillemet points out,⁶ seeing that Pasion was debarred from marital authority, not by virtue of his being only a *δημοποίητος*, but Civil rights.

¹ Cf. Demosth. *c. Steph.* ii. 13.

² Demosth. *Pro Phorm.* 32.

³ Demosth. *c. Neaer.* 92, 104, 106.

⁴ *Ibid.*

⁵ Pollux, viii. 85, 86.

⁶ *Op. cit.* pp. 36 seq.

simply because she was an heiress, *ἐπίκληρος*;¹—in which case the law specially provided that her estate should pass into the hands of their son, who would himself become her legal protector (*κύριος*).

Elements of
private
international
law.

It will have already appeared from various considerations in the foregoing chapters that certain rudiments of private international law were recognized in Greece. Fuller development was impossible, on account of the very conditions of private and public life in antiquity, the conception of exclusive citizenship, the imperfect notion of comity and of balance of power, the comparatively small international intercourse, coupled with national instability, and, subsequently, absorption of the conquered races by the 'barbarous' conquerors, and the consequent severance of the continuity of organic development.

Citizenship and
domicile.

Owing to some or other of these conditions and causes, the retention of citizenship was conceived to be dependent on the citizen's continuance of domicile within the territory of the State; but, of course, temporary absence did not necessarily entail such disqualification. Allegiance at a distance was considered inadmissible. The nationality of origin depended on the principle of *ius sanguinis*, and *ius sanguinis* was the veritable basis of citizenship. In order to belong to a political group in Greece it was indispensable to belong to a family group. As the extension of the family was the tribe, so the expansion of the tribe was the State. Hence transitory aliens and even, for the most part, such as were permanently resident within the territory, were not regarded (apart from special concessions) as being amenable to the ordinarily established national juridical organizations; so that a special jurisdiction had perforce to be introduced in the interests of justice and State policy.

Jurisdiction as
to aliens in
antiquity.

There are distinct traces of such provisions amongst the most ancient peoples. In the case of the Hebrews,

¹ On *Epiclerus*, see Smith's *Dictionary of Greek and Roman Antiquities* (London, 1890), vol. i. p. 746.

for example, we find certain applications of the Mosaic law extended to incoming strangers.¹ The Egyptians often allowed foreign merchants to avail themselves of local judges of their choice and even of their own nationality in order to regulate questions and settle differences arising out of mercantile transactions, in accordance with their own foreign laws and customs; —the Greeks especially enjoyed these privileges on Egyptian territory.² The Ptolemies had established the office of *ξενικοί ἀγοράνομοι*, foreign 'secretaries of the market.'³ And analogous institutions are found amongst many other nations of antiquity.⁴ This special jurisdiction for foreigners received its most systematic development in Greece and Rome; and the results were so beneficial that, in the opinion of some recent writers, even modern legislators could in many respects derive useful lessons therefrom,—“... c'est là que les législateurs modernes pourraient, sur plus d'un point, chercher d'utiles leçons.”⁵

In Greece special magistrates, *ξενodikai* (a general term, In Greece, *zenodikai*. for which special names were substituted in different localities), were instituted for trying questions in which foreigners were involved. Sometimes such magistrates were appointed on the initiative of the particular national government in question, sometimes provisions were arranged to that effect by means of special conventions between States. In some cases these judges exercised full judicial power in pronouncing decisions as to the matters in dispute, in others they appear to

¹ Cf. J. Selden, *De synedriis et praefecturis veterum Ebraeorum libri duo* (London, 1653), esp. vol. ii. pp. 79, 81.

² Cf. Pardessus, *op. cit.* i. 52.—See Herodot. ii. 178.

³ See G. Lumbroso, *Recherches sur l'économie politique de l'Égypte sous les Lagides* (Turin, 1870), p. 248.

⁴ See Rodière, *Du préteur pérégrin et de l'existence plus ou moins latente d'une institution analogue à la sienne chez tous les peuples* (in *Recueil de l'académie de législation de Toulouse*, 1868, t. xviii. pp. 339-351).

⁵ A. Weiss, *Traité théorique et pratique de droit international privé*, 5 vols. (Paris, 1892-1905), vol. v. p. 3.

Treaty between
Oeantheia and
Chalaeum.

have merely investigated the points at issue, and submitted their results to the ordinary magistrates, who were to deliver the final verdict. Thus we find, on the testimony of epigraphic documents, *ξενοδῖκαι* at Ephesus,¹ at Stiria² in Attica, at Mylasa³ in Caria, at Medeon,⁴ and also in pursuance of the convention between the two Locrian towns of Oeantheia and Chalaeum.⁵ The latter convention was entered into in the fifth century B.C. for the purpose of regulating the practice of reprisals and for settling claims arising therefrom. It provided that if the Oeantheian plaintiff was a metoec in Chalaeum, the action was to be tried by the ordinary tribunals of Chalaeum consisting of citizens chosen by lot, and that he was entitled to plead through his proxenus. But if he was not a metoec there his suit was to be brought before the specially appointed *ξενοδῖκαι* at Chalaeum, and he was empowered to choose from among the leading residents of the town a jury of nine or fifteen citizens according to the importance of the case. Should the action, however, be brought by a citizen of Chalaeum in the interests of public order, the tribunal was then to be composed of an odd number of jurors, nominated by the demiurgi (*δημιουργοί*), the principal magistrates of the town, and the matter in litigation was to be decided by the majority.⁶

¹ Dittenberger, *Sylloge inscriptionum* . . . 344.

² *Ibid.* 294.

³ *Bull. de corr. hellén.* vol. v. p. 102, l. 4.

⁴ *Ibid.* vol. v. p. 46, l. 38.

⁵ C. Michel, *Recueil d'inscriptions grecques* (Paris, 1900), no. 3; Hicks, *op. cit.* 44.—And cf. *infra*, chap. xvii.

⁶ This treaty is inscribed on both sides of a bronze tablet, which was found at Galaxidi (Oeantheia), and is now in the British Museum. On account of its special interest, the text (taken from Hicks, no. 44) is given in full:

Obverse.

: Τὸν ξένον μὴ ἵαγειν: ἐ' τὰς Χαλειῖδος: τὸν Οἰανθία μ-
ηδὲ τὸν Χαλειέα: ἐ' τὰς Οἰανθίδος: μηδὲ χρήματα αἱ τι' συ-
λῶν: τὸν δὲ συλῶντα ἀνάτω' συλῆν' τὰ ξενικά ἐ' θαλάσας ἵαγειν:
ἄσυλον:, πλὰν ἐ' λιμένος: τῷ κατὰ πόλιν: αἱ κ' ἀδίκῳ συλῶνι: τέ-
τορες δραχμαί: αἱ δὲ πλέον δέκ' ἀμαρῶν ἔχοι τὸ σῦλον, ἡ-

Again, amongst communities in Crete, and notably in Gortyna (respecting whose municipal jurisprudence some remarkable documents, the "laws of Gortyna," are now available), we find the foreign magistrate described in several inscriptions as the κόσμος κσένιος,¹ and sometimes more briefly as the κσένιος² (who corresponded practically to the Athenian polemarch). Not only were aliens under his jurisdiction, but also freedmen, ἀπελεύθεροι, who were in Gortyna, as in many other Hellenic States, assimilated in the matter of civil capacity and privileges to the metoecs.

The magistrate
for foreigners
in Crete.

There are no grounds for believing, according to the view of M. Dareste, that the κόσμος κσένιος did not directly decide foreign cases referred to him without sending them to the national tribunals;—"très probablement il jugeait directement, sans renvoi à un juge (δικαστής), toutes les affaires concernant les étrangers."³

These Cretan foreign courts are mentioned frequently in contradistinction to the regular municipal courts, which were, of course, reserved (in the absence of

μόλιον ὀφλέτω Φό τι συλάσαι. : Αἱ μεταφοικέοι πλέον μηνὸς ἢ ὁ Χαλειεύς ἐν Οἰανθείᾳ ἢ Οἰανθεὺς ἐν Χαλείῳ, τᾷ ἐπιδαμῖαι δίκαι χρήστω. : Τὸν πρόξενον, : αἱ ψευδέα προξενέοι, : διπλ-
εῖω θωιήστω.

Reverse.

Αἱ κ' ἀνδιχάζωντι : τοὶ ξενοδίκαι, : ἐπωμότας : ἐλέσ-
τω : ὁ ξένος : ὡπάγων : τὰν δίκαν : ἐχθος προξένω
καὶ Φιδίω ξένω : ἀριστίνδαν, : ἐπὶ μὲν ταῖς μναῖα-
ίαις : καὶ πλέον, : πέντε καὶ δέκ' ἀνδρας, : ἐπὶ ταῖς
μειόνοις : ἐννέ' ἀνδρας : αἱ κ' ὁ Φασστὸς ποί τὸν Φ-
αστὸν δικάζεται κα' τὰς συμβολάς, : δαμωργοὺς
ἐλέσται : τοὺς ὀρκωμότας ἀριστίνδαν τὰν πε-
ντορκίαν ὁμόσαντας : τοὺς ὀρκωμότας τὸν αὐτὸν
ν ὀρκον ὁμνύειν, : πληθὺν δὲ νικῆν.

¹ See D. Comparetti, *Le leggi di Gortyna e le altre iscrizioni arcaiche cretesi*. In *Monumenti antichi* (Milano, 1893), vol. iii. p. 73, no. 148. The fourth line here speaks of . . . τὸν κσένιον κόσμον μὴ λαγαίεν. . . . The same document is given in Dareste, Haussoullier, and Reinach, *Recueil des inscrip. jurid. gr.* pt. iii. p. 403.

² Comparetti, *loc. cit.* no. 150, l. 15.

³ Dareste, etc. *Recueil* . . . , p. 430.

specific favours to aliens) for suits between citizens, *ἀστικάι δίκαι*.¹ And elsewhere these foreign jurisdictions are contrasted with the *ἐπιδαμιαί δίκαι*, the causes between natives, as in the case of the Oeantheian law,² or with the *ἀστικὸν δικάστηριον*, the court for citizens, as in the case of a fourth century inscription from Amorgos³ (an island of the Sporades group, in the Aegean Sea). Similarly in Ephesus, amongst other municipalities (some of which have already been referred to), we find the *ξενικὸν δικάστηριον*,⁴ which, though it was originally and more properly a permanent tribunal dealing with controversies between foreigners amenable to it, or between citizens and foreigners, ultimately developed into a general court taking cognizance also of most commercial causes, irrespective of the nationality of the litigants.⁵ Again, in Miletos, whose interests were mainly commercial, the judges were the five commissioners of the market, *τοῦ ἐμπορίου ἐπιμεληταί*; and in Priene (as well as in some other places), they were the regular *στρατηγοί*.⁶ Courts of this description existed in most Greek towns, and more conspicuously, of course, in the larger commercial cities. Thus Aristotle

In Oeantheia.

In Ephesus.

In Miletos.

¹ The expression in the Gortynaean inscription is *ἀστία δικά*.—Cf. Comparetti, *loc. cit.* no. 32, l. 2; no. 149, l. 4.

² Cf. the text of the treaty between Oeantheia and Chalaeum, *supra*, p. 195, l. 7 of the obverse portion.

³ *Bull. de corr. hellén.* vol. xii. (1888), p. 232, ll. 32-33:

..... δέ τὰς δίκας ἐπὶ τῷ ἀστικῷ δικάστ[η]
ρίῳ γενέσθαι...

Similarly, ll. 49-50.

⁴ Dittenberger, *Sylloge*, 344 (an inscription of the early part of the first century B.C.).

⁵ Cf. Dareste, etc. *Recueil*, pt. i. p. 45: "C'est une juridiction ordinaire et permanente, analogue au *praetor peregrinus* romain; son nom lui vient sans doute de ce qu'elle a été instituée primitivement pour juger les contestations entre étrangers ou entre citoyens et étrangers; par extension, on finit par lui attribuer la plupart des affaires de commerce."

⁶ Cf. the fragment of the treaty between Miletos and Priene, in Newton, *Greek Inscriptions*, pt. iii. no. 414.

speaks of them as normal institutions, called into operation when matters of aliens were concerned,—τοῦ δὲ ξενικοῦ ἐν μὲν ξένοις πρὸς ξένους, ἄλλο ξένοις πρὸς ἀστούς.¹ Their presiding judges were designated by the general appellation of *ξενodikai*, or by such special names as have already been mentioned above.

Sometimes it is difficult to discriminate between the *ξενικὸν δικαστήριον*, the permanent court for foreign cases, and special courts of arbitration (referred to by the same name) consisting of foreign judges. Thus, it has been contended by one or two recent writers² that the Ephesian court, above referred to, belonged to the latter category; but no conclusive reasons have been advanced in support of this view.

Thus the organization of the *ξενodikai* presented the elements of an international jurisdiction exercised in local territory,—“une ébauche locale de jurisdiction internationale”;³ but in regard to the importance and extent of issues arising from the relationships between citizens and non-citizens, or between non-citizens amongst themselves, this jurisdiction was soon superseded in Athens by the establishment of the more stable and more clearly defined magistracy, exercised by the polemarch (πολέμαρχος).⁴ “Le polémarque,” says a

The *xenodikai*
and the
polemarch.

¹ *Pol.* iv. 13. 2.—Pollux refers (viii. 63) to the *ξενικὸν δικαστήριον*, but he gives no information on the subject.

² C. Lécrivain, *Une catégorie de traités internationaux grecs, les Symbola*. In *Bulletin de l'Académie des sciences, inscriptions, et belles-lettres de Toulouse*, vol. ii. (1898-1899), no. 3, pp. 150-159; at p. 152.—Similarly, it is to the *ξενικὸν δικαστήριον* as a court of arbitration that Thalheim refers when he describes it as a tribunal composed of foreigners, which was sought to be established particularly in times of agitation when sufficient confidence could not be placed in the impartiality of the national courts;—“einen Gerichtshof aus Fremden gebildet, den man sich namentlich in aufgeregten Zeiten erbat, weil man einheimischen Richtern die nötige Unparteilichkeit nicht zutraute” (in Pauly-Wissowa, *Real-Encyclop.* vol. v. pt. 1, p. 573).

³ Weiss, *op. cit.* vol. v. p. 4.

⁴ See G. Perrot, *Le droit public de la république athénienne* (Paris, 1867), pp. 258 *seq.*

The *symbola*.

recent writer already referred to, "fut pour les isotèles, pour les proxènes, pour les métèques, même pour les étrangers de passage, et d'une manière générale pour tous ceux à qui le droit de cité était refusé, ce que l'archonte éponyme était pour les citoyens."¹ This magistrate was particularly active in the trial of suits arising out of conventions (σύμβολα, in earlier language, ξυμβολαί),² —usually (but by no means exclusively) such as were entered into for the mutual protection of commerce, for eliminating or minimizing as far as possible the older process of reprisal (ρύσια, σῦλα or σῦλαι),³ and for regulating the jurisdiction over controversies relating to commercial intercourse. In Athens, in the fourth century B.C., they were discussed and concluded by the heliasts, under the presidency of the *thesmo-thetae*.⁴ The relationship thus established was ἀπὸ συμβόλων κοινωνεῖν,⁵ conventional 'communion,' and the suits issuing therefrom were called αἱ ἀπὸ συμβόλων

¹ Weiss, *op. cit.* vol. v. p. 5.

² Corp. *inscrip. Att.* vol. ii. no. 11, ll. 13 *seq.* Harpocration gives the following definition: συνθήκαι ἃς ἂν ἀλλήλαις αἱ πόλεις θέμεναι τάττωσι τοῖς πολίταις ὥστε διδόναι καὶ λαμβάνειν τὰ δίκαια. Cf. Arist. *Pol.* iii. 1. 3.—Probably the word σύμβολα, as a recent French writer points out, came to designate a treaty from the fact of the word σύμβολον signifying originally the signs or tallies (the *tesserae hospitalitatis*) held by individuals in the case of private hospitality, and by cities in that of public hospitality. The same author also suggests, with reason, that it was the word σύμβολα which was translated by Livy as "commercium iuris praebendi repetendique" (xli. 24), in reference to the negotiations, 174 B.C., between the Achaeans and Perseus of Macedon, for an extradition treaty as to fugitive slaves. (See C. Lécirvain, *Une catégorie de traités internationaux grecs, les symbola*. In *Bulletin de l'Académie des sciences, inscriptions, et belles-lettres de Toulouse*, vol. ii. (1898-1899), no. 3, pp. 150-159.)

³ As to such relationships in the case of the Athenian league, cf. Stahl, *De sociorum Atheniensium iudiciis* (Münster, 1881), and see also *infra*, chap. xvi., as to Athens and her allies.

⁴ Demosth. *De Halon.* 9; Arist. *Ath. Pol.* 59; Pollux, viii. 88: καὶ τὰ σύμβολα τὰ πρὸς τὰς πόλεις κυροῦσι, καὶ δικαστὰς ἀπὸ συμβόλων εἰσάγονσι...

⁵ Aristot. *Polit.* iii. 1. 4.

δίκαι, or δίκαι συμβόλαιαι.¹ Thus in a treaty between Athens and Phaselis made about 395 B.C.-385 B.C., it was stipulated that any controversy relating to an agreement concluded at Athens between merchants of Athens and those of Phaselis should be brought before the Athenian polemarch; but that actions arising out of contracts not concluded at Athens should be tried pursuant to the terms of the previous treaty with Phaselis; and, further, it provided that if any Athenian magistrate should proceed to hear such suits in contravention of these clauses his judgment was to be void.² It would follow from this that under the terms of the previous treaty referred to, the place where the contract was made did not necessarily determine where the action was to be brought; so that in the

Treaty between
Athens and
Phaselis—
question of
jurisdiction.

¹Thuc. i. 77.—One or two writers (e.g. Boeckh; Goodwin, in *Amer. Journ. of Philology*, 1880) have drawn a distinction between the δίκαι συμβόλαιαι and the δίκαι ἀπὸ συμβόλων, to the effect that the former were 'commercial suits,' or 'suits arising out of contracts,' and the latter were suits brought by a citizen of one State against a citizen of another under the rights laid down specifically by a convention. In answer to this, it may briefly be said that no cogent reasons have been advanced in support of such a discrimination, and that ancient writers have used the two expressions interchangeably.—Cf. Jowett, in his translation of Thucydides (Oxford, 1881), vol. ii. note to Thuc. i. 77, and the introductory note, pp. lxxv-lxxviii.—M. Lécrivain emphasizes (in Daremberg-Saglio, *s.v. Ephesis*, p. 643) that there never was any essential difference in meaning between the words σύμβολα and συμβολαί; and that the δίκαι ἀπὸ συμβόλων were not "les procès issus de contrats commerciaux privés, mais les procès jugés en vertu des traités diplomatiques des σύμβολα."

²*Corp. inscrip. Att.* ii. 11; Hicks, *op. cit.* 36.

... τοῖς Φασηλίταις τὸ ψ[ήφ]ι-
[σμα ἀν]αγράψαι, ὃ τι ἀμ[ε] μὲ[ν] 'Αθ-
[ήνησι] ξ[υ]μβόλ[αιον] γένηται
[πρὸς Φ]ασ[η]λίτ[ων] τινά, 'Αθή[νη]-
σι τὰς δίκας γίγνεσθαι πα[ρ]-
ὰ τῷ πο[λ]εμάρχῳ καθάπερ X-
[ίους καὶ] ἄλλοι μὲν δὲ ἀμ[ε]. τῷ
[ν δὲ ἄλλων] ἀπὸ ξυμβολῶν κατ-
ὰ τὰς Χίων ξ[υ]μβολὰς πρὸς Φα-
[σηλίτας] τὰς δίκας εἶν[αι],
τὰς [δὲ ἐκκλήτ]ου[s] ἀφελεῖν.

fifth century (that is, prior to the above-mentioned treaty between the two cities) a suit against a Phaselite for violating a contract not concluded at Athens could not be entertained by the Athenian tribunals,—he could be sued only in the courts of his own city. Accordingly the general principle came to be established, not only in Athens but in Hellenic States generally, that in commercial cases, the defendant's *lex domicilii* was applicable,¹ though sometimes a departure therefrom was made by the adoption of the *lex loci contractus* conformably to the exigencies of the particular case.

The *lex loci contractus*, and the *lex domicilii*.

With the rapid increase of commercial relationships between more distant localities, the latter principle, that is, the *ratio loci*, frequently predominated in the absence, of course, of treaties stipulating otherwise; so that the tribunal of the place where the contract was concluded possessed jurisdiction in the case of disputes arising out of it. When large interests were at stake, and it was important, by the very nature of the circumstances, to effect a speedy settlement, so as not to put an undue check on business enterprise, it was obviously found, for the most part, more convenient and expeditious to appeal to the *lex loci contractus*, rather than to the defendant's *lex domicilii*, or to his *ius originis*.

Personal law and territorial law.

A striking passage of Demosthenes emphasizes the distinction between the personal law and the territorial law in regard to their respective applicability. There was a dispute between Athens and Macedonia concerning Halonnesus, a small island off Thessaly; and in 343 B.C., an embassy was despatched to Macedonia with a view to adjusting this difference as well as other subjects of dispute then existing in reference to Amphipolis, Potidaea, and the affairs of the Chersonese. "That

¹See Gilbert, *op. cit.* vol. i. pp. 487-8; Wilamowitz-Möllendorff, in *Hermes* (Berlin), vol. xx. p. 240; Goodwin, in *American Journal of Philology*, 1880, p. 10.—That this was a regular principle in Greece appears also from the above-stated Oeantheia-Chalaeum convention, and from the observation of Aeschines, *c. Timarch.* 158.

there is no need of a judicial treaty between Athens and Macedonia," exclaimed Demosthenes, "past times may suffice to show. Neither Amyntas, nor Philip's father, nor any other Kings of Macedon ever entered into such a convention with our State, although the intercourse between us was formerly greater than it is; for Macedonia was dependent on us and paid us tribute, and we then resorted to their ports, and they to ours more frequently than now, and there were not the monthly sessions punctually held, as at present, for mercantile causes, dispensing with the necessity of a law-treaty between such distant countries." Demosthenes then concludes with the important statement: "Though nothing of the sort then existed, it was not requisite to enter into a treaty, so that people should sail from Macedonia to Athens for justice, or Athenians to Macedonia; we obtained redress by their laws and they by ours."¹

In actual practice, however, the great majority of suits of this nature would find their way into the Athenian tribunals, when the conventions relating thereto were concluded with allies forming part of the confederation, of which Athens assumed the hegemony. In the first place, the *lex loci contractus* (if the contract was not made in Athens) was, in certain circumstances, dispensed with, and the Athenian courts invested with full competence, irrespective of the *ius originis* of the parties;—a provision which applied also to non-allied communities. Thus Demosthenes states that in the case of all general conventions relating to mercantile expeditions from or to Athens, and where there was a written contract, the suits (*δίκαι ἐμπορικαί*) of maritime traders and wholesale merchants involved therein were to be laid before the courts at Athens: οἱ νόμοι κελεύουσιν . . . τὰς δίκας εἶναι τοῖς ναυκλήροις καὶ τοῖς ἐμπόροις τῶν Ἀθήναζε καὶ τῶν Ἀθήνηθεν συμβολαίων, καὶ περὶ ὧν

Activity of the
Athenian
courts—com-
mercial suits.

¹ *De Halonneso*, 11-13, 13: ἀλλ' ὅμως οὐδενὸς τοιούτου ὄντος τότε οὐκ ἐλυσιτέλει σύμβολα ποιησαμένους οὐτ' ἐκ Μακεδονίας πλείν Ἀθήναζε δίκας ληψομένους, οὐθ' ἡμῖν εἰς Μακεδονίαν, ἀλλ' ἡμεῖς τε τοῖς ἐκεῖ νομίμοις ἐκείνοί τε τοῖς παρ' ἡμῖν τὰς δίκας ἐλάμβανον.

ἀν ᾧσι συγγραφαί.¹ At first, these causes were decided by the polemarch, the usual judge when either of the parties was an alien, as we have seen in the treaty between Athens and Phaselis, concluded at the beginning of the fourth century B.C.; afterwards, at the time of Demosthenes, the *thesmothetae* presided at the trials.² Secondly—apart from the above conditions—the Athenian tribunals were so active in the hearing of cases of aliens of allied States, that Athens would seem to have arbitrarily arrogated to herself entire jurisdiction over her confederates; whereas, in reality, the law of the non-Athenian defendants' domicile might also have ordinarily been resorted to in pursuance of the general rule, subject to the modifications thereof mentioned. "It would no doubt practically come to pass," says an American writer, "that most of such suits would, even by the terms of the treaties, have to be tried in Athenian courts. For in most cases the Athenians would be the defendants. The feelings with which the dominant Athenian demos, as a whole, regarded the subject allies, could hardly fail to exhibit themselves in the dealings of individual Athenians with those with whom they had commercial relations; and so it would come to pass that in the great majority of such cases it would be the citizen of an allied State who was the plaintiff, and he must necessarily, therefore, sue in an Athenian court. We may consider also that suits brought against Athenians by citizens of any one of the subject cities would all be tried at Athens; whereas the suits brought by Athenians against any citizens of their tributary states would be tried one at Rhodes, another at Phaselis, another at Samos, and so on. The judicial range, therefore, of the Athenian courts must have greatly surpassed that of the courts of any one of the allies, perhaps of all of them together; and thus, even

¹ *c. Zenothem.* 1.—Cf. Demosth. *In Midiam*, 176.

² Demosth. *c. Aratur.* 1 : τοῖς μὲν ἐμπόροις . . . καὶ τοῖς ναυκλήροις κελεύει ὁ νόμος εἶναι τὰς δίκας πρὸς τοὺς θεσμοθέτας.—Cf. Demosth. *Pro Phorm.* 45; Arist. *Ath. Pol.* 59.

without any formal infraction of the reciprocity implied by the existence of *σύμβολα*, the impression may easily have come to exist, which the statements quoted from the grammarians express, that it was the Athenians who decided, in accordance with the terms of the several *σύμβολα*, the commercial suits of their subjects."¹

It appears that though the *δίκαι ἀπὸ συμβόλων* and the *δίκαι ἐμπορικαί* (commercial cases, in the strict sense) extended much over the same ground, yet there were certain distinctions between them. For example, the *δίκαι ἐμπορικαί* (other than those, as above stated, in which Athenian expeditions were concerned) were heard by the tribunals of the country where the contract was entered into, and were decided in pursuance of the general municipal law of that country, and not by the particular, and more or less temporary stipulations specially embodied in the *σύμβολα*.² In either case provision was often made for 'appeal,' or, more correctly, for the purpose of *ρεπυοί*, by the nomination of a third city, *πόλις ἐκκλητος*, to officiate as a special court of arbitration; as—to give here only one or two instances—in the treaty between Hierapytna and Priansos;³ between Athens and the Boeotian league;⁴ between Naxos and Arcesine (in the island of Amorgos).⁵

In order to supplement and to illustrate further the foregoing considerations, it will be of advantage to mention concisely a few of the treaties (in addition to those already set forth) which were entered into between two or more communities, not only for the purpose of regulating the jurisdiction and judicial machinery with regard to their subjects' disputes arising out of com-

Examples of
'law-treaties.'

¹ Morris, in *American Journal of Philology*, 1884, p. 306.

² Cf. the article in Smith's *Dictionary of Greek and Rom. Antiq.* s.v. *Symbolon*, p. 734.

³ See *infra*, p. 207, and chap. xvii.

⁴ See *infra*, p. 207.

⁵ *Bull. de corr. hellén.* vol. viii. p. 25, ll. 28-29: καθάπερ δίκην ὠφληκόντων ἐν τῇ ἐκκλησίᾳ κατὰ τὸ σύμβολον τὸ Ναξ(ί)ων καὶ Ἀρκεσινίων...

mercial contracts in particular, but also with a view to providing such measures and procedure as would facilitate the solution of conflicts of law consequent on their relationships in general. A convention of this nature might perhaps be conveniently designated a 'law treaty,' by analogy with the German term *Rechtsvertrag* as used, for example, by a recent German writer. The *Rechtsvertrag* is defined by him much in the same way as has been suggested in the present exposition, thus: "Ein Vertrag, durch den zwei oder mehr Gemeinwesen das Verfahren in privatrechtlichen Streitigkeiten ihrer Angehörigen ordnen."¹

Between
Sparta and
Argos.

In the second of the two treaties between Lacedaemon and Argos which were concluded in 418 B.C., Thucydides relates that provision was made for the settlement of international differences by arbitration, in accordance with the ancestral customs of the parties,² and that for this purpose an appeal should be made to some State considered by them to be impartial; further, that so far as individual subjects of the signatories were concerned, their 'ancestral customs' (which would be tantamount to their *ius originis*) should as far as possible be permitted to operate.³

Between
Athens and
Selymbria.

The convention between Athens and Selymbria⁴ (a Thracian town), concluded about 408-407 B.C., provided that in disputes arising out of treaties, either those that occurred between citizens of the two States, or those between one of the States and citizens of the other, a settlement was to be effected in pursuance of a previous

¹ H. F. Hitzig, *Altgriechische Staatsverträge über Rechtshilfe*. In *Festgabe Ferdinand Regelsberger* (Zurich, 1907), p. 7.

² Thuc. v. 79: ... ἐπὶ τοῖς ἴσοις καὶ ὁμοίοις δίκαις διδόντας κατὰ πάτρια.

³ *Ibid.*: αἱ δὲ τινι τῶν πόλεων ἢ ἀμφίλογα, ἢ τῶν ἐντὸς ἢ τῶν ἐκτὸς Πελοποννήσου, αἴτε περὶ ὧν αἴτε περὶ ἄλλου τινὸς, διακριθῆμεν. αἱ δὲ τις τῶν ξυμμάχων πόλις πόλει ἐρίῃ, ἐς πόλιν ἐλθεῖν, ἂν τινα ἴσαν ἀμφοῖν ταῖς πόλεσι δοκοίη.—For the full treaty, see *infra*, chap. xvii.

⁴ Von Scala, *Staatsverträge*, no. 93.

agreement (of which nothing is here stated) relating to judicial procedure.

..... ὅτι δ' ἂν ἀμφισβη-
[τῶσι δίκας] εἴ(τ)ναι ἀπὸ ζυμβόλων.¹

Treaty between Athens and Samos,² 405-403 B.C.—Between
Athens and
Samos.
After the battle of Aegospotamoi, Samos having remained faithful to Athens, and having offered them assistance in the prosecution of the war, the Athenian ecclesia passed a decree (ψήφισμα) conferring citizenship on the Samians without thereby depriving them of their independence, and providing for the due adjustment of controversies between their subjects in conformity with the prior conventions relating to judicial process :

καὶ περὶ τῶν ἐγκλημάτων ἃ ἂν γίγνηται | πρὸς ἀλλήλους
διδόναι καὶ δέχεσθαι τὰς δίκας κατὰ τὰς συμβολὰς τὰς οὕσας.³

In reference to the affairs between Athens and NaxosBetween
Athens and
Naxos. (c. 378 B.C.) there is an inscription⁴ embodying an Athenian decree which concerns the competence of the Naxian tribunals, and draws a distinction between the δικαστήριον ἐν Νάξῳ and the δικαστήριον Ἀθήνησι.

Treaty between Athens and Iulis, together with other Cean towns, 363-362 B.C.⁵—In 376-375 B.C. Ceos had joined the new Athenian confederation,⁶ but about 363 B.C. an anti-Athenian revolution broke out in the island. Subsequently, after the disturbance was quelled, it was arranged that offenders were to appear before the strategoi in Iulis within thirty days, or at Athens, the ἑκκλητος πόλις, where certain cases had to be tried.

... ἐξεῖναι αὐτοῖς ἐγγυη-
τὰς καταστήσασι πρὸς [τ]οῦ[ς] σ[τ]ρατηγούς τοὺς Ἰουλιητῶν τρ-
ιάκοντα ἡμερῶν δικά[ς] ὁ[π]ο[ύ]σιν [κα]τὰ τ[οῦ]ς ὁρκους καὶ τὰς
συνθήκας ἐν Κέῳ καὶ [ἐν τῇ ἐκκ]λήτῳ [πό]λει Ἀθήνησι.⁷

¹ *Ibid.* ll. 20-21.

² *Corp. inscrip. Att.* iv. 2. 1 b ; Michel, 80 ; Hicks, 81.

³ Hicks, *loc. cit.* ll. 18-20.

⁴ *Corp. inscrip. Att.* iv. 2. 88 d.

⁵ *Corp. inscrip. Att.* iv. 2. 54 b ; Michel, 95 ; Hicks, 118.

⁶ On the Athenian leagues, see *infra*, chap. xvi.

⁷ Hicks, *ibid.* ll. 46-49.

Further, apart from the criminal offences which are in question here, the Ceans undertook to allow all cases involving sums of more than a hundred drachmas to be tried in the first instance at Athens, the *ἐκκλητος πόλις*.

... τὰς δὲ δίκας καὶ [τ-
ας γραφὰς τὰς κατ' Ἀθηναίων ποιήσομαι] πάσας ἐκκλήτους [κ-
ατὰ τὰς συνθήκας, ὅποσαι ἂν ᾖσιν ὑπὲρ ἑκατὸν δραχμᾶς.¹

This example, amongst various other instances, shows clearly that the expression *ἐκκλητος πόλις*, in reference to international conventions, does not necessarily mean a 'court of appeal,' as most writers have wrongly assumed, but simply the city—agreed upon in the treaty in question, or subsequently to be agreed upon—which is to hear certain causes. Such city was either one of the contracting parties (as was frequently the case in the Athenian leagues, when Athens asserted her predominance), or a third State, officiating practically as an arbitral tribunal.

Again, as to jurisdiction in the case of certain crimes, we have another inscription² setting forth an Athenian decree (c. 445 B.C.)—relative to the Chalcidians of Euboea—which was passed when the hegemony of Athens was developing into dominance over the confederates of the first league. It was there decided that such of the more serious offences as entailed the penalty of death, banishment, or disfranchisement were to be tried in Athens.

Decree as to the
Chalcidians.

Between
Messene and
Phigalia.

In the treaty of isopolity between Messene and Phigalia,³ entered into about the middle of the third century B.C., there is found a reference to a prospective convention for regulating the jurisdiction as to any complaints of the parties.

ποιήσασθαι δὲ καὶ συμβολὰν ᾗ [ν κα δοκεῖ] ἀμφοτέραις ταῖς πόλεσις.⁴

¹ Hicks, *ibid.* ll. 73-75.

² *Corp. inscrip. Att.* supp. 27 a.—Cf. Antiphon, *De caede Herodis*, 47.

³ Dittenberger, 181; Michel, 187.

⁴ Michel, *ibid.* ll. 12-13.

In the convention between Athens and the Boeotian league,¹ concluded in the second half of the third century B.C., for the settlement of their differences, the city of Lamia was agreed upon to act as the *ἐκκλητος πόλις*. Between Athens and the Boeotian league.

The alliance between Hierapytna and Priansos² (about the end of the third century B.C.) provided for the interchange of a large number of rights and privileges, and laid down that contractual obligations were to be determined by the principle of the *lex loci contractus*, that a common tribunal, *κοινὸν δικαστήριον*, consisting of an equal number of judges or arbitrators from each of the parties, was to try all offences against the terms of the treaty, that certain other differences might, if desired, be submitted for final decision to a third city, *ἐκκλητος πόλις*, within a month after the convention was ratified, that subsequent disputes should be adjusted within two months after the appointment of the common court, which was to sit in the place as arranged by the annual magistrates, and that mutual guarantees were to be given for the faithful despatch of the proceedings. Between Hierapytna and Priansos.

As to the affairs of the Achaean league and Rhodes,³ we find in the second century B.C. that the Rhodians despatched an embassy to the Achaeans to negotiate for the renewal of a previous convention, *διόρθωσις τοῦ συμβόλου*, by which their grievances might be judicially settled. Between Rhodes and the Achaean league.

In the treaty between Lato and Olus⁴ (two Cretan towns), in the latter half of the second century B.C., certain regulations were agreed upon with regard to their respective territorial jurisdictions, visits of magistrates to determine questions of law, and, further, mutual freedom was secured to engage in commercial Between Lato and Olus.

¹ *Corp. inscrip. Att.* ii. 308 ; iv. 2. 308 b.

² *Corp. inscrip. Graec.* 2556.—See also *infra*, chap. xvii.

³ *Bull. de corr. hellén.* vol. xxvii. p. 243.

⁴ *Corp. inscrip. Graec.* 2554 (esp. ll. 56-76) ; Egger, *Traité public*, p. 125 ; Michel, 28.

transactions and to enter into contracts in each other's country, in accordance with the laws of the two contracting parties.¹ Some stipulations of a similar character are embodied in the more recent convention between Rome and Chios.²

Between Rome and Chios.

Difficulty of the subject.

The subject which has been discussed in the latter half of the present chapter is an extremely difficult one; in the first place, on account of a large measure of indefiniteness and ambiguity in the original documents, coupled with their frequent fragmentary character, so that the safe determination of allusions and references contained therein is rendered impossible; secondly, owing to the varied practices of States, and modified policy of the same States at different epochs, and under the stress of particular circumstances. Certain conclusions, however, may be drawn, which alone will sufficiently indicate the efforts made in Greece to solve conflicts of laws, and to promote international comity.

General conclusions

Generally speaking, in time of peace freedom of intercourse, and especially of engaging in mercantile transactions, *ἐπιμῖξια* (corresponding approximately to the Roman *ius commercii*) was permitted between the citizens of different States, subject to the payment of customs duties, port dues, etc., and, in some cases, to restrictions respecting the exportation and importation of certain commodities, such as oil, corn, etc. In most towns, there was a permanent court exercising jurisdic-

¹ *Corp. inscrip. Graec.* 2554:

... κύριον δ' ἤμεν τόν τε Λάτιον ἐν 'Ολόντι ποτὶ τὸν 'Ολόντιον, καὶ 'Ολόντιον ἐν Λατῷ ποτὶ τὸν Λάτιον, καὶ πωλέοντα διὰ τὰ χρεώψια καὶ ὠνέομενον, καὶ δανείζοντα καὶ δανειζόμενον καὶ τὰ ἄλλα πάντα συναλλάττοντα κατὰ τὼς ταῦτα νόμους τὼς ἐκατέρῃ κειμένους. See *infra*, chap. xvii.

² *Corp. inscrip. Graec.* 2222, ll. 15-20:

... ἡ σύν[κλη]τος εἰ[δ]ικῶς ἐβεβαίωσεν, ὅπως νόμοις τε καὶ ἔθεσιν καὶ δικαίοις [χρῶν]ται [ἀ] ἔσχον ὅτε τῇ 'Ρωμαίων [φι]λίᾳ προσῆ[λ]θον, ἵνα τε ὑπὸ μηθ' ᾤτινι[οῦν] τύπῳ ᾧσιν ἀ[ρ]χόντων ἢ ἀνταρχόντων, οἳ τε παρ' αὐτοῖς ὄντες 'Ρω[μαίο]ι τοῖς Χείων ὑπακούσιν νόμοις.

tion over causes to which aliens were parties; and these judicial organizations, as well as the presiding judges, were variously designated, so that we hear of the *ξενικὸν δικάστηριον* (a general name for the foreign court), the *ξενοδίκαι* (a general name for the presiding judges), the *πολέμαρχος* (the Athenian archon, who took special cognizance of the affairs of metoecs), the *κόσμος ξένιος* (of Cretan towns), and the like. These institutions and magistracies usually existed apart from express provision in international conventions (*σύμβολα* or *συμβολαί*); but treaties were very frequently concluded either to ensure the due and impartial operation of these tribunals, or to establish a new mixed court of judges, the *κοινὸν δικάστηριον*, and, at the same time, nominate a third city, *πόλις ἑκκλητος*, as a 'court of appeal,' in the sense of a tribunal to which the issues were submitted for final decision after a preliminary examination by the court of first instance. As to the law that was applied in the settlement of conflicting claims, sometimes the *lex loci contractus* (the prevailing law of the place where the engagement in question was entered into) operated, at other times the *lex domicilii* of the defendant, sometimes, again, broad equitable principles were invoked in order to effect a fair reconciliation between the contending legislations of the States concerned, and, finally, an express judicial dispensation might be resorted to in virtue of an *ad hoc* agreement. At first the alien suitor was obliged to plead through the agency of the proxenus or his patron, as the case may be; but with the expansion of commerce and general intercourse, the increase of litigation, and the more generous attitude that came to be manifested towards non-citizens, the foreigner was, in actual practice, and despite strict theory, commonly allowed to appear in person and address the court, and to instruct advocates to plead for him. Finally, provision was usually made for the hearing of suits within a certain fixed period, so as to prevent an undue delay of justice.

CHAPTER IX

ROME AND FOREIGNERS¹

Roman
citizenship.²

As it has already been seen, there was in the earlier period of Roman history a close relationship between citizenship and the practice of the city's religion. The enjoyment of political rights was largely dependent on assistance at the sacred ceremonies of lustration.³ In the later period certain modifications were gradually introduced, which tended to emphasize the purely civic and political aspect, and to remove to the background, if not wholly to eliminate, the religious side.

Civitas
Romana and
ius Quiritium.

The expressions *civitas Romana* and *ius Quiritium* have been taken by some writers to be equivalent in their signification of Roman citizenship. Practically they may for most purposes be regarded as synonymous, though the former implies rather a condition, a status,

¹ The following, amongst other writings, may be mentioned: M. I. G. Rogéry, *De la condition des étrangers en droit romain* (Montpellier, 1886); E. Chénou, *La loi pérégrine à Rome, loc. cit.*; G. Humbert, *Mémoire sur la condition des pèlerins chez les Romains* (in *Recueil de l'Académie de législation de Toulouse*, 1870); P. van Wetter, *La condition civile des étrangers d'après le droit romain* (Appendix to Laurent's *Droit civil international*, vol. i. pp. 667-678).—Further works on special points are indicated in the Bibliography.

² On Roman citizenship, see the following: W. Eisendecher, *Ueber die Entstehung, Entwicklung und Ausbildung des Bürgerrechts im alten Rom* (Hamburg, 1829); F. Lindet, *De l'acquisition et de la perte du droit de cité romaine* (Paris, 1879); H. Lesterpt de Beauvais, *Du droit de cité à Rome...* (Paris, 1882); G. Grenouillet, *De la condition des personnes au point de vue de la cité... en droit romain* (Paris, 1882); G. de Letourville, *Étude sur le droit de cité à Rome...* (Paris, 1883).

³ Dion. Hal. iv. 15; Cic. *Pro Caec.* 34.

whilst the latter usually has reference to privileges ensuing from the fact of belonging to the original family or stock. Later the term *civitas Romana* was generally adopted, as has been pointed out by Poste¹ and others, in the bestowal of the franchise on a peregrinus, and sometimes also in the case of a Latinus,² whilst the term *ius Quiritium* was used when the same was granted to a Latinus Iunianus.³

The mode and conditions of acquiring Roman citizenship will be considered below.⁴ The *civitas Romana* might be lost either by voluntary renunciation, or as a result of the infliction of certain punishment. Roman conceptions show an advance on Greek in that no individual was held to be capable of enjoying the citizenship of two or more different States;⁵ so that if a Roman became a naturalized subject of a foreign State, either through his own initiative or by honorary conferment, he was *ipso facto* divested of his former *civitas*.⁶ Again, in earlier times a citizen who avoided the census or escaped from military service was liable to be sold into slavery,—an event which would necessarily entail loss of citizenship.⁷ The same loss was incurred by those who were condemned to exile with ‘*aquae et ignis interdictio*’; and, further, under the Empire, by those who were sentenced to deportation,⁸ or consigned

How Roman citizenship was lost.

¹ *Gaii Inst.* p. 54.

² Cf. Gaius, *Inst.* i. 28.

³ Cf. Pliny, *Epist.* x. 4 (Pliny writing to Trajan): “Quare rogo, des ei civitatem, est enim peregrinae conditionis, manumissus a peregrina . . . Idem rogo, des ius Quiritium libertis Antoniae Maximillae . . . quod a te, petente patrona, peto”; *ibid.* x. 5: “Ago gratias, domine, quod et ius Quiritium libertis necessariae mihi feminae, et civitatem Romanam Harpocrati, iatraliptae meo, sine mora indulsisti.”

⁴ See chap. xi.

⁵ Cic. *Pro Caec.* 34: “... ex nostro iure duarum civitatum nemo esse possit. . .” See note 2, *infra*, p. 246.

⁶ Cf. Corn. Nep. *Atticus*, 3; Cic. *Pro Balbo*, 12.

⁷ Cic. *Pro Caec.* 34; Dion. Hal. iv. 15.

⁸ Gaius, i. 128; Ulpian, x. 3; *Dig.* xlviii. 19. 17; *ibid.* 22. 6.

to the wild beasts ('ad bestias'), or sent to the mines ('in metalla'), or to hard labour ('servi poenae'),¹ and also by those who were delivered (*deditio*) to the enemy by fetial procedure,² and those who were publicly declared enemies of the commonwealth.³

Cicero on the
loss of
citizenship.

Cicero is at pains to show that citizenship was lost only through a voluntary abandonment of it. It is asked how, he argues, Roman citizens have frequently departed for Latin colonies, if citizenship cannot be lost;—they went either voluntarily, or fled to escape the penalty of the law; whereas, had they submitted to it, they would have remained in Rome and retained their citizenship.⁴ Again, if those who have been condemned to exile elected rather to remain in Rome and suffer the rigour of the law, they would lose citizenship only with loss of their life; when, on the contrary, they accept exile and are hence received into another city, they themselves renounce their citizenship; it is not really taken away from them, since by Roman law it is not admissible to enjoy a twofold citizenship at the same time.⁵ A Roman, Cicero continues, cannot change his citizenship against his will, and cannot do so by merely desiring such change; it can only be effected by actual admission into the roll of citizens of a foreign community.⁶

¹ *Dig. (ibid.)*.

² *Cic. De orat. i. 40; Pro Caec. 34.*

³ *Dig. iv. 5. 5.*

⁴ *Pro Caec. 33*: "... quemadmodum, si civitas adimi non possit, in colonias latinas saepe nostri cives profecti sunt. Aut sua voluntate, aut legis multa profecti sunt; quam multam si sufferre voluissent, tum manere in civitate potuissent."

⁵ *Ibid. 34*: "... qui si in civitate legis vim subire vellent, non prius civitatem, quam vitam amitterent; quia nolunt, non adimitur his civitas, sed ab his relinquitur atque deponitur. Nam, quum ex nostro iure duarum civitatum nemo esse possit, tum amittitur haec civitas denique, quum is, qui profugit, receptus est in exilium, hoc est, in aliam civitatem."

⁶ *Pro Balbo, ii.*: "Iure enim nostro neque mutare civitatem quisquam invitatus potest neque, si velit, mutare non potest, modo adsciscatur ab ea civitate, cuius esse se civitatis velit."

It is obvious that Cicero is here inferring some of his conclusions on really theoretical considerations and *a priori* principles. The law in its practical applications did not work out on these stringent lines. Indeed, Madvig says with much truth that Cicero is merely resorting to subtlety and specious argument in his endeavour to prove that a Roman citizen could not lose his citizenship in spite of himself, that exile did not really entail its loss, and that only naturalization in the country of his exile could bring about a deprivation of his former rights. In point of fact exile, accompanied by 'aquae et ignis interdictio,' and by a declaration that his exile was in accordance with the law, 'iustum ei exsilium esse,' carried with it loss of citizenship; and such loss was not essentially the consequence of a deliberate act of naturalization abroad, inasmuch as this proceeding was not bound to be notified to the Roman government, and, moreover, in view of the fact that the exile could reside abroad as an *inquilinus*,¹ (sojourner).

The Romans had less national vanity than the Greeks, whether in regard to religion or in regard to intellectual matters in general. Their attitude to foreigners was marked by less exclusiveness and greater liberality of a systematic character than that of the Greek race. Foreign religions and foreign gods were more readily admitted into the Roman commonwealth. Aliens were not held to be necessarily deprived of all juridical capacity. In some cases this capacity was taken to be

¹J. N. Madvig, *Die Verfassung des römischen Staates*, 2 Bde. (Leipzig, 1881-2), vol. i. p. 55 note: "Ciceros Behauptung (*pro Caec.* 33, 34, *pro Balbo*, 11, *de Domo*, 20), keiner verliere das Bürgerrecht wider Willen, und, wer in die Verbannung gehe, der verliere erst das Bürgerrecht durch die Aufnahme in einen fremden Staat, läuft auf die arge Spitzfindigkeit hinaus, dass man sich durch Selbstmord oder Hinrichtung dem Verluste des Bürgerrechtes entziehen könne. Der Verbannte verlor das Bürgerrecht durch die römische *aquae et ignis interdictio*, durch die Erklärung, *iustum id ei exsilium esse*, nicht durch die Aufnahme in den fremden Staat, die den Römern gar nicht notificiert ward, oft gar nicht eintrat, indem der Verbannte in der fremden Stadt als *inquilinus* lebte."

independently applicable and effective, in other cases its potentiality was recognized, but its applicability and operativeness had to be sanctioned and regulated by means of explicit pacts, conventions, treaties.

Extreme
statements
by writers.

In reference to the question of Rome's relationship to aliens, as in a good many other questions of ancient international law, one must guard against extreme assertions, or unwary exaggerations. Some writers, for example, have claimed that the Romans regarded aliens as being on a footing of perfect equality, others have peremptorily dismissed the question by asserting that they considered strangers as possessing all the attributes of hostility. In the one case, as an Italian writer has expressed it, there is an exaggeration through extravagant idealism, in the other, a rigorous disparagement which would assimilate the Romans to savages,—“... gli scrittori hanno spesso esagerato o per un idealismo eccessivo o per un rigorismo che avrebbe assimilati i Romani a selvaggi.”¹

It is, first of all, desirable to say a few words about the meanings of such expressions as *peregrinus*, *hostis*, *perduellis*, *amicus*, and the like.

Meaning of
peregrinus

The word *peregrinus*² has strictly no precise equivalent in English. Such terms as ‘alien’ and ‘foreigner’ are only approximate renderings. It has a larger denotation than ‘alien,’ inasmuch as it implies not only the nationals of foreign States or of colonies, either autonomous or dependent, but also what the Greeks called ἀπόλιδες, individuals actually without a country, State, or city, those who could not be called *cives* at all,—such as the *dediticii*, subjugated by Rome and deprived of their civic organization, as well as exiles, outlaws. And, further, before the issue of Caracalla's constitution, the majority of the subjects of Rome in her provinces were even denominated *peregrini*. The expression ‘non-

¹ G. Padelletti, *Storia del diritto romano*.—Con note di P. Cogliolo (Firenze, 1886), p. 69, note (a).

² On *peregrinus*, see further *infra*, latter part of the present chapter.

citizen' is still more inadequate than 'alien' to indicate the position of the peregrin; for 'non-citizen' would, under the earlier Empire, include the Latini Iuniani, who were not *cives*, and yet were not regarded as *peregrini*.¹

The word *hostis*,² like the Greek ξένος, presents greater difficulty, and has been the cause of much misunderstanding and error on the part of most modern writers. Just as the word ξένος meant both 'stranger' and 'guest,' so *hostis* had this twofold signification. Indeed the word *hostis* etymologically corresponds to the Gothic *gast(i)s*, German *Gast*, English *guest*.³ And further, among the Romans *hostis* came to signify 'enemy.' Thus Cicero says that in the earlier times an enemy, instead of being called by the more accurate name *perduellis*, was termed *hostis*; and that formerly *hostis* had the same signification as the word *peregrinus* in his own time.—“Equidem etiam illud animadverto, quod, qui proprio nomine ‘perduellis’ esset, is ‘hostis’ vocaretur, lenitate verbi rei tristitiam mitigatam. Hostis enim apud maiores nostros is dicebatur, quem nunc ‘peregrinum’ dicimus.”⁴ Varro writes to the same effect. Speaking of the obscurity of many origins of words, and also of the many curious transformations in their meanings, he gives as an example *hostis*, which, he says, formerly meant a ‘foreigner’ belonging to another nation, and now implies what was then conveyed by the expression *perduellis*, an enemy against whom war is

The term
hostis.

¹ Cf. Muirhead, *op. cit.* p. 105, and note.

² On its etymology, cf. Mommsen, *Das Römische Gastrecht und die Römische Clientel* (in *Römische Forschungen*, Berlin, 1864-1879), vol. i. pp. 326 *seq.*, notes 1-3; W. Corssen, *Kritische Beiträge zur Lateinischen Formenlehre* (Leipzig, 1865), pp. 217 *seq.*—On the ancient conception, see Ihering, *op. cit.* i. p. 227; C. Sell, *Die Recuperatio der Römer* (Braunschweig, 1837), pp. 2 *seq.*

³ Cf. M. Bréal and A. Bailly, *Dictionnaire étymologique latin—Leçons des mots* (Paris, 1882); O. Schrader, *Sprachvergleichung und Urgeschichte* (Naumburg a. S. 1883) (English translation, *Prehistoric Antiquities*, p. 350).

⁴ *De offic.* i. 12.

being made.¹ Virgil uses the phrase *hostilis facies* with the meaning of the 'face of a foreigner.' Hence, because at one time *hostis* meant 'stranger,' and at another time 'enemy,' a good many modern writers, evincing a disposition to vilify Roman or ancient practices and conceptions in general, especially when impatiently contrasted with the beneficent results of Christian doctrine and civilization, have fallen into the error of imagining that in antiquity 'foreigner' was necessarily synonymous with 'enemy,'—a conclusion carelessly arrived at, regardless of context, time, and place. One may just as well reason,—and certainly with no less justification and logical cogency,—that because *hostis* is structurally allied to *guest* and probably to *hospes*² (or, at least, appears to have been so regarded by the earlier writers), and also because *hostis* meant an 'enemy,' therefore enemies were treated in war on the same footing as guests, or that guests were assimilated to the belligerent enemy. Whatever may be the favourite notions of *a priori* dogmatists, the Romans did not of necessity identify aliens with enemies, especially so at the time of their more systematically developed constitution. And this will be shown more fully below when the different classes of peregrins in Rome are considered. One must guard against confusing aliens, *peregrini*, with barbarians, in the sense almost of pirates or marauders, belonging to no definitely organized State.

Amici.

Amici were distinguished from *hostes* much in the same way as modern international law discriminates between States forming part of the family of nations, and peoples held to be outside it. The latter have not

¹ *De ling. Lat.* v. 3 : "... hostis, nam tum eo verbo dicebant peregrinum, qui suis legibus uteretur, nunc dicunt eum, quem tum dicebant perduellum."

² According to Servius, certain ancient authors assimilated the word *hospes* to *hostis*. *Ad Aen.* ii. 424 : "Nonnulli autem juxta veteres hostem pro hospite dictum accipiunt. ... Inde nostri hostes pro hospitibus dixerunt."

strictly the right to claim the benefits conferred by this law, just as the *hostes* were originally conceived by the Romans to be outside law,—*extrarii*. “*Extrarius est qui extra forum, sacramentum iusque est.*”¹ But in practice, even in the earlier times, this theoretical severity was scarcely ever applied. And, moreover, the institutions of *hospitium* and *clientela*, in addition to many express international conventions, were the means of introducing still greater relaxations, preparing the way for the notion (even if of a rudimentary character) of the comity of nations.

As in Greece and other ancient communities, the *Hospitium*. guest-tie² played an important part in Rome, where it became more clearly defined from a juridical point of view. It forms the basis of one of the most ancient, if not actually the oldest, of international conventions.³ Certain laws of hospitality were, no doubt, common to all the peoples of Italy,⁴ but there it never assumed the indiscriminate character of the like institution in the Greek heroic age and even in later Greek history.

First it took the form of private hospitality, which later developed into the *hospitium publicum*. Thus there was the bond of *hospitium* between Scipio Africanus and Syphax, King of the Massaesylians, a tribe of the Numidians, as between Hasdrubal the Carthaginian and Syphax.⁵ There was a similar relationship between Eumenes, King of Pergamum, and the Rhodians. Private ties of this character were made by the Romans

Development
of the private
form into the
public.

¹ Festus, *De verb. signif.* s.v. *Extrarius*.

² On *hospitium*, see Mommsen, *Das Römische Gastrecht*, *loc. cit.*, pp. 319-390; s.v. *hospitium*, in Daremberg-Saglio, *op. cit.* On the commercial origin of the institution of hospitality, cf. Ihering, *Die Gastfreundschaft im Alterthum* (in *Deutsche Rundschau*, Berlin, June, 1887, pp. 357-397).

³ Cf. J. B. Mispoulet, *Les institutions politiques des Romains*, 2 vols. (Paris, 1882-83), vol. ii. p. 10.

⁴ Aelian. *Var. hist.* iv. 1; Liv. i. 1.

⁵ Liv. xxvii. 54; xxix. 23, 29; xxx. 13.

with the inhabitants of the most distant towns.¹ The privilege of being a patron of a foreign people was esteemed by the Roman patricians. Thus, Quintus Fabius Sanga was the patron of the Allobroges, who were in many ways much indebted to him,—“Q. Fabio Sangae, cuius patrocínio civitas plurimum utebatur. . . .”²

Private
hospitality.
Its obligations.

Hospitium privatum assured the foreigner, with whom the relationship existed, the protection of the Roman patron, a kindly reception, and honourable treatment generally,—“ . . . privata hospitia habebant ; ea benigne comiterque colebant ; domusque eorum Romae hospitibus patebant, apud quos ipsis deverti mos esset.”³ It involved a certain obligation on the part of the protector to tend him during illness, and even to superintend his obsequies,⁴ it was also his duty to give him advice and assistance in case of legal proceedings⁵ instituted by him or against him,—in a word, to look after his interests in general. The person of the guest was held to be sacred, and to put him to death was a crime classed with parricide.⁶

*Tessera
hospitalis.*

This undertaking was a purely voluntary one, and was usually recorded on a tablet (*tessera*),⁷ of which a copy or a fragment thereof was retained by each of the parties.⁸ The customary formulae of *hospitium* are preserved in numerous inscriptions.⁹ In one of these inscriptions

¹ Dion. Hal. viii. 3. 30.

² Sallust, *Catil.* 41.

³ Liv. xlii. 1 ; cf. Liv. i. 58 ; Plaut. *Mil. Glor.* 674 : “ In bono hospite atque amico quaestus est quod sumitur. . . . ”

⁴ *Corpus inscriptionum Latinarum* (1863, etc.), ed. Mommsen and others, vol. ii. 5556.

⁵ Cic. *Divin. in Caecil.* 20.

⁶ Cf. Hor. *Carm.* ii. 13, ll. 5-8.

⁷ See Daremberg-Saglio, *op. cit.* vol. iii. pt. i. p. 298, where illustrations of different forms are shown.

⁸ Cf. Plautus, *Poen.* 958 : “ Ad eum hospitem hanc tesseram mecum fero ” ; and cf. ll. 1042 *seq.*—On *tesserae* generally, see G. F. Tomasini, *De tesseris hospitalitatis* (Amstelodami Frisii, 1670).

⁹ Cf. J. C. von Orelli and G. Henzen, *Inscriptionum Latinarum selectarum amplissima collectio* . . . , 3 vols. (Turici, 1828-1856), nos. 156, 1079, 3056-9, 3693, 4037 ; suppl. nos. 6413, 6416 ; *Corp. inscrip. Lat.* vol. ii. no. 2633.

contained on a brass tablet, the obligation to the posterity of the parties concerned is indicated,—“... cum liberis posterisque || eius . sibi . liberis posterisque suis . tesseram hospitalem || cum eo fecerunt. Uti se in fidem || atque clientelam vel suam || vel posterorum suorum || reciperet. Atque ita in hac || re. . . .”¹

It is true that the arrangement did not rest entirely on a juridical basis; but it was universally recognized to be under the protection of the gods, especially of ‘Iupiter hospitalis’;² and the sanction of religion was no less effective in practice than that of the law. A deliberate violation of the engagement was deemed to subject the offender to divine retribution, as well as to *infamia*, a censure involving disqualification as to certain public and private rights.

The *hospitium privatum* was usually a reciprocal undertaking, involving rights and duties of mutual assistance and protection, whether in peace or in war,³ which devolved upon the sons or other heirs of the respective parties, as has already been pointed out. Thus Livy refers to ambassadors who arrived from King Perseus (B.C. 171), mainly through the reliance on relationships of private hospitality subsisting between him and Marcius; which tie of hospitality had existed between their fathers,—“... legati a Perseo rege venerunt, privati maxime hospitii fiducia, quod ei paternum cum Marcio erat.”⁴

To sever such hereditary bond an express renunciation (*renuntiatio*) was necessary,⁵—a proceeding which was sometimes resorted to in the case of a dangerous conflict between these obligations and that of patriotism. Livy⁶ gives a striking account of such a renunciation

¹ No. 1079, *ut supra*.

² Cf. Virg. *Aen.* i. 731 : “Iuppiter, hospitibus nam te dare iura locuntur. . . .”

³ Liv. xxv. 18 ; xl. 13 ; Plut. *Syll.* 32.

⁴ Liv. xlii. 38.

⁵ Dion. Hal. v. 34 ; Liv. xxv. 18 ; Cic. *In Verr.* ii. 6. 79 ; Sueton. *Calig.* 3.

⁶ xxv. 18 : cf. Cic. *In Verr.* ii. 36. 89.

on the part of a Campanian. During the war between Rome and the Campanians (212 B.C.), Titus Quinctius Crispinus was a 'guest' of Badius, a Campanian. Badius sent for Crispinus, who thought his host desired merely a friendly interview, seeing that their private bond, as he assumed, would continue even amidst the disruption of public ties.¹ But Badius challenged him to a combat, to which Crispinus replied that each of them had enemies enough to display his valour upon ; "for his own part, even if he should meet him in the field, he would turn aside lest he should pollute his right hand with the blood of a host."² Thereupon Badius taunted him with cowardice, and stigmatized him as an enemy sheltering himself under the title of a guest, and so he made a formal renunciation of the tie. "If he considered," he exclaimed, "that when public treaties were broken, the ties of private relationship were not severed with them, then Badius the Campanian openly and in the hearing of both armies renounced his tie of hospitality with Titus Quinctius Crispinus, the Roman. He said that there could exist no fellowship or alliance between him and an enemy, whose country and tutelary gods, both public and private, he had come to fight against. If he was a man he would meet him."³ Crispinus thereupon obtained permission of his generals, met Badius, and defeated him. This contention on the part of Crispinus that the tie survived even an outbreak of hostilities between their respective States was

¹ Liv. *ibid.* : "... ratus colloquium amicum ac familiare quaeri, manente memoria etiam in discidio publicorum foederum privati iuris..."

² *Ibid.* : "... se, etiamsi in acie occurrerit, declinaturum, ne hospitali caede dextram violet..."

³ *Ibid.* : "... Si parum, publicis foederibus ruptis, dirempta simul et privata iura esse putet, Badium Campanum T. Quinctio Crispino Romano palam, duobus exercitibus audientibus, renuntiare hospitium. Nihil sibi cum eo consociatum, nihil foederatum, hosti cum hoste, cuius patriam ac penates publicos privatosque oppugnatum venisset. Si vir esset, congraderetur."

by no means a novelty ; for it was even in such serious emergencies usually admitted and respected.¹

The *hospitium publicum* was an extension of the private form. It assured the hospitality of the Roman com-^{Public hospitality.} monwealth either to an individual or to the collective body of citizens of a foreign State. As to the individual, the distinction and privileges were conferred for special services or good offices towards the Roman people ; as, for example, in the case of Timasitheus (394 B.C.), the chief magistrate of Liparae, who protected the Roman ambassadors and their offering to Apollo from attacks of pirates of the Liparenses, in return for which the Senate decreed that a league of hospitality should be formed with him, and presents also sent to him.² And, in this connection, Livy cannot refrain from adding that Timasitheus was a man more like the Romans than his own countrymen,—“... Romanis vir similior quam suis.”³

The honour of public *hospes* was at times granted also by a foreign State to distinguished Roman citizens. Thus in the third century B.C., Sparta conferred the honour on a Roman, and the inscription recording this concession speaks of ξένα τὰ μέγιστα ἐκ τῶν νόμων...].⁴

With regard to a whole State a like public relation-^{Such bond with entire State.} ship was established, when all its subjects were granted the privileges in question, in return for similar rights given to Romans visiting or residing in the territory of that State.

Of the exact nature of the rights and privileges incidental to *hospitium publicum* it is difficult to state^{Privileges of public hospitality.} details with certainty. The few texts we have which relate to the subject are far from explicit, and have been interpreted differently by different investigators. Thus,

¹ Val. Max. v. 1. 3.

² Liv. v. 28 : “Hospitium cum eo senatus consulto est factum donaque publice data.”—Cf. Plut. *Camill.* 8.

³ *Ibid.*

⁴ *Corp. inscrip. Graec.* i. no. 1331.

in most of the citations given by Mommsen¹ the real implication, as Willems has pointed out² following Walter,³ concerns the *ius legatorum* rather than the *hospitium publicum*; and the two institutions, though involving certain common elements, are by no means identical. Mommsen particularly lays stress on the *senatusconsultum de Asclepiade Polystrato*⁴ (78 B.C.); but this *senatusconsult* relates to provincials,⁵ and confers on them privileges, such as the *immunitas*, which cannot, from the very nature of the conditions, be extended to subjects of autonomous and independent States.⁶ This *senatusconsult* appears to indicate that there existed a certain specific formula which precisely defined the privileges contained in the *hospitium*; but there is no extant text giving such formula.

Amicitia and hospitium.

There was a certain resemblance, and there was an important difference, between *hospitium* and *amicitia*. But the word *amicitia*, or rather its content, was somewhat of an elastic character. Sometimes the term was applied to the closest federal relationships, sometimes it indicated more or less vague and undefined associations, suggesting good feeling and comity rather than political or legal adjustments. Thus, it was alike applied to the relationship existing between those cities which constituted the military symmarchy in Italy, and to that

¹ *Das Röm. Gastrecht*, *loc. cit.* p. 344, notes 35, 36, 37; p. 345, note 39; p. 346.—Cf. F. Walter, *Geschichte des römischen Rechts*, 2 Thle. (Bonn, 1860-1); § 83, note 31.

² *Le droit public romain*, p. 392.

³ *Op. cit.* § 83, note 31, p. 118, where he thus writes, and, to a large extent, justifiably, of Mommsen's conclusions: "Allein alle von ihm angeführten Beweisstellen, mit Ausnahme des SC. de Asclepiade, reden von Legaten und fremden Königen und das SC. redet von einem besonders begünstigten Falle. Ein Schluss auf die gewöhnlichen *hospites publici* ist unzulässig; dawider spricht schon deren grosse Zahl."

⁴ *Corp. inscrip. Lat.* i. pp. 110-112.

⁵ Cf. Walter, *ibid.* in the preceding note.

⁶ See Orelli and Henzen, *Inscrip. Lat.* no. 784.

with the distant Carthaginians,¹ with whom there was naturally much less real kinship. As a rule, *amici* were considered to be under the public guardianship, *in publica tutela*, of the State within whose territory they were temporarily resident. *Hospitium*, whether *publicum* or *privatum*, was generally hereditary (as has already been mentioned), and was to a great extent of the nature of patronage,—the *paterfamilias* being bound by the sanctions of *fas*,² if not of a positive *lex*, to treat the *hospes* on terms of equality, whereas the client (*cliens*) occupied a more subordinate position.

*Clientela*³ implied rather a unilateral relationship. The *cliens* was in a condition of dependence and *tutela* which subjected him to the authority of his patron “ad quem se applicaverit”; so that his position bore a certain analogy to that of the *filius familias*, or to the relationship of ‘pupil’ to ‘tutor.’ On the other hand, *hospitium* was for the most part of a bilateral nature. Again, *clientela* usually implied abandonment by a client of his former citizenship, and establishment in his patron’s country where, particularly in his relationships with his patron, certain elements of citizenship were conceded to him; whereas *hospitium* appertained to a foreigner who retained his original citizenship. The client gave his patron personal service; he accompanied him to war;⁴ he contributed to the dowry of his daughters, to the ransom of any members of his family from captivity, to the discharge of any fines that might be inflicted on him, and to the expenses in magistracies

Clientela—
relation to
hospitium.

¹ Polyb. iii. 22.

² On *fas* and *lex*, see *supra*, pp. 86 *seq.*

³ On *clientela*, see Koellner, *De clientela* (Göttingen, 1831); J. Roulez, *Considérations sur la condition politique des clients dans l’ancienne Rome* (in *Bulletins de l’Académie Royale de Bruxelles*, t. vi. pt. i. pp. 304 *seq.*); Mommsen, *Das Röm. Gastrecht* . . . *loc. cit.*; M. Voigt, *Über Clientel und Libertinität* (in *Königlich sächsischen Gesellschaft der Wissenschaften*, Berlin, 1878); Ihering, *op. cit.* vol. i. pp. 236-245; G. Humbert in Daremberg-Saglio, *s.v. cliens* (and see bibliography there).

⁴ Dion. Hal. vi. 47; vii. 19; ix. 15; x. 43.

or other honours conferred on him.¹ Mutual obligations of fidelity existed between them, so that neither could bring an action or bear testimony against the other.² The client could not strictly take part in the city's religion, but he was permitted to share, in a measure, the *sacra privata* of his *patronus*. In return, the patron was obliged to assist and represent him in legal proceedings, and generally to aid him in all circumstances where his assistance was desirable.³

Sacred
sanction.

The due observance of these functions was sanctioned by religion, by *fas*. Violation of faith entailed the imprecation of *sacratio capitis*, which put one practically in the position of being guilty of treason (*perduellio*),—though this applied rather to the crime committed by the *cliens* against his *patronus*. The XII. Tables enforced the good faith of the patron towards the client, and had specifically said as to its violation: "Patronus si clienti fraudem fecerit, sacer esto."⁴

Patronage of
entire peoples.

In time—at the end of the Republic and under the earlier empire—this private institution assumed a wider form, so that entire cities sought similar protection of influential or distinguished Romans.⁵ Thus, Sicily obtained the patronage of the Marcelli and of Cicero, Messina and the Lacedaemonians of the Claudii; the Fabii became the patrons of the Allobroges; the Gracchi, of Spanish peoples; among Cato's clients were the Cappadocians and the inhabitants of Cyprus.⁶

Allegation as
to abuse.

There are, no doubt, shortcomings and abuses in every ancient regulative system, no matter how theo-

¹ Dion. Hal. ii. 10; Liv. v. 32; xxxviii. 60.

² Plut. *Mar.* 5; Aul. Gell. v. 13; xx. 1.

³ Dion. Hal. ii. 10: . . . δίκας θ' ὑπὲρ τῶν πελατῶν ἀδικουμένων λαγχάνειν, εἴ τις βλάπτειτο περὶ τὰ συμβόλαια, καὶ τοῖς ἐγκαλοῦσιν ὑπέχειν.—Cf. Cic. *De orat.* iii. 33; Horat. *Epist.* ii. 1. 104: "... clienti promere iura . . ."; Plut. *Cato.* 23; Plaut. *Menaech.* 475.

⁴ Cf. Serv. *Ad Aen.* vi. 609; Festus, s.v. *sacer*.

⁵ Tacit. *Ann.* iii. 55.

⁶ Cf. W. A. Becker, *Gallus* (Berlin, 1883), Sc. 1, Excursus 4.

retically sound and well-intentioned it may be ;—but are modern systems free from abuses and deficiencies ? There were admittedly in Rome some cases of hardship in the patronage of individuals as of cities ; but we are by no means warranted, on this account, in going to the extent of Laurent's assertion : "Le patronage des clients fut trop souvent, comme la suzeraineté féodale, une oppression mal déguisée . . .,"¹—a statement which he does not prove, and in which the expression "trop souvent" may be taken to represent widely different conditions amongst different people according to their attitude.

Now to return to the question of public hospitality, as distinguished from this relationship of *clientela*. *Hospitium publicum*, as Mommsen says,² assured to the individual *hospes*, or to the subjects in general of the foreign community with which the tie was established, on any occasion when they might take up their residence in Rome, in the first place *locus*, *aedes liberae*,³ *Locus*. a gratuitous lodging ; secondly, *lautia*,⁴ strictly the *Lautia*. various utensils necessary for the bath, but ordinarily including also those used in the kitchen ; and thirdly,

¹ *Hist. du droit des gens*, vol iii. p. 78.

² *Das röm. Gastrecht*, *loc. cit.* pp. 343-4.

³ Liv. xxx. 17 ; xxxv. 23 ; xlii. 6.—Cf. Liv. xxx. 21 ; xxxiii. 24 ; Val. Max. v. 1, 1a, b.—Sometimes a private house was taken, Liv. xlv. 44.

⁴ In Greek, *παροχή*,—Polyb. xxii. 1 ; xv. 6 ; xxxii. 19 ; cf. Cic. *Ad Att.* xiii. 2. 2.—Charisius describes it as *supellex* (furniture), and the glossators speak of *ἐνδομενία* (Mommsen's note to pp. 343-4 of *Das röm. Gastrecht*, *loc. cit.*).—The word *lautia* appears originally to have been *dautia* ; cf. Festus, *Ep.* p. 68 : "Dautia quae lautia dicimus dantur legatis hospitii gratia" ; explained by a glossator as *ἐνδομενίαι*, *σκεύη τὰ κατὰ τὴν οἰκίαν*, that is, certain household furniture which a traveller could not carry about with him, e.g. *lecti* (beds), as mentioned by Cicero (*Ad Att.* vi. 16. 3). Mommsen insists that the relation with *lautus*, *lavare* is inadmissible, in view of the alleged ancient form *dautia*, which, he thinks, is perhaps cognate with *daps*, *δαπάνη* (outgoings, expenditure).—But all this yet remains mere conjecture. (Cf. Mommsen, *Röm. Staatsrecht*, vol. iii. pt. ii. p. 1152, note 2.)

Munera.

munera,¹ gifts of gold or silver ware (but held usually only whilst the residence continued), also clothing, arms, horses, etc. "Das öffentliche Gastrecht begründet einen Anspruch auf Gastverpflegung sowohl für die befreundeten Individuen selbst wie für die als deren Vertreter, oder als Vertreter der befreundeten Gemeinde abgesandten Boten. Dies schliesst eine dreifache Leistung in sich, deren Beschaffung in Rom zunächst den städtischen Quästoren obliegt; freies Quartier, wozu in der Regel der Gemeindehof (*villa publica*) auf dem Marsfeld benutzt ward; das sogenannte Badegeräth (*lautia*), das heisst alle Ausrüstung, welche der Gast braucht um den Badekessel zu erwärmen und sich die Speisen zu bereiten; endlich eine Gastgabe, nicht ein freies Geschenk, sondern wie schon der Name sagt, eine Leistung (*munus*), durchgängig in Gold- oder Silbergeräth gewährt. . . ."²

Public
hospitality and
international
conventions.

Objections to
Mommson's
opinion.

This public hospitality formed the basis of the provisions in treaties generally, and represented the minimum of mutual rights and obligations laid down in an international compact. According to the conclusion of the eminent writer just quoted, this relationship was not essentially distinguishable from that of *amicitia*. But to his conclusion there are several objections, which are well urged by Willems.³ In the first place the sources draw a certain distinction between them; for example, in the *Digest*, where postliminy in time of peace, and enemy character are considered, the *amicitia*, *hospitium*, and *foedus* are specifically enumerated, not as equivalents, but as denoting the different degrees of alliance: "In pace quoque postliminium datum est: nam si cum gente aliqua neque amicitiam neque hospitium neque foedus amicitiae causa factum habemus, hi hostes quidem non sunt, quod

¹ Hence the word *municeps* which, as is suggested by Rudorff, is derived from *munus capere*, in the sense of receiving presents by individuals in the capacity of *hospites*.

² *Das röm. Gastrecht . . . loc. cit.* pp. 343-4.

³ *Le droit pub. rom.* p. 391, note.

autem ex nostro ad eos pervenit, illorum fit, et liber homo noster ab eis captus servus fit et eorum; idemque est, si ab illis ad nos aliquid perveniat.”¹ Secondly, the historical examples of *hospitium publicum* are rare, especially between Rome and a foreign State.² Willems mentions, as an additional argument, an example of public hospitality between Rome and the Aedui of Gaul, of which relationship Caesar says: “Aeduos fratres consanguineosque saepe numero a senatu appellatos,”³ and Tacitus: “Soli Gallorum fraternitatis nomen cum populo Romano usurpant.”⁴ But it is doubtful whether his inference can be drawn from this particular case. More probably the expressions quoted in its support indicate a patronizing attitude on the part of the Romans towards the barbarians; and this would be equally applicable in the case of a tie of *amicitia*. Thirdly, the *hospitium publicum* was not necessarily a bilateral obligation, but was frequently a privilege granted as a reward by the Roman people to a foreign subject or to an entire community. If it were always of a reciprocal character, are we to maintain that such relationships existed between the whole Roman people and a single foreign individual? “Comprend-on, sans cela, un *hospitium publicum* entre tout le peuple romain et un seul étranger?”⁵ Lastly, it is hardly possible to admit that all the *amici* and *socii* of Rome enjoyed the full rights and privileges of *hospitium*.

A later chapter will consider further the relationships between Rome and other States as established and regulated by treaties and conventions.

In the consideration of the position of foreigners⁶ in Rome, the different periods of her history must be care-

Position of
aliens in Rome.

¹ *Dig.* xlix. 15 (de captivis et de postliminio et redemptis ab hostibus), 5. 2.

² *Liv.* v. 28 and 50.

³ *De bell. Gall.* i. 33.

⁴ *Ann.* xi. 25.

⁵ *Droit pub. rom.* p. 392, note.

⁶ On the development of the conception of *peregrinus*, cf. Puchta, *Cursus der Institutionen*, vol. ii. p. 105; Madvig, *op. cit.* vol. i.

fully distinguished. In her earlier times, Roman law was marked by a spirit of comparative exclusiveness. Juridical capacity of an individual was recognized in ancient legislations, only in direct relation to the duly constituted State of which he was a subject. *Hostis* and *peregrinus* were then closely correlated terms, if not almost synonymous, for all practical purposes. With the development of Rome, there were gradual and continual relaxations of the early stringent exclusiveness. In this respect Rome was much more liberal than Greece; and she borrowed from the Greeks various institutions,¹ when recognized to be advantageous to the community and to the State policy. Polybius, discussing the army of the Romans, its constitution, arms, etc., says they copied and introduced innovations whenever they considered them to be beneficial in any way. "For no nation," says he, "has ever surpassed them in readiness to adopt new fashions from other people, and to imitate what they see is better in others than themselves,"—*ἀγαθοὶ γὰρ εἰ καὶ τινες ἕτεροι μεταλαβεῖν ἔθῃ, καὶ ζηλωσαι τὸ βελτίον καὶ Ῥωμαῖοι.*² Rome readily assimilated conquered peoples, and with free independent States she entered into various kinds of relationships. Practical necessity prevailed over the letter of the law, as well as over inveterate tradition, and facilitated the recognition of the rights of *peregrini*. The early notion of *peregrinus* ultimately disappeared; and the denotation of the name became modified so as to harmonize the better with a broader system of jurisprudence, and with the conception of the juridical personality of foreign sovereign communities. We find the rise of political and juridical, or quasi-juridical, institutions like *clientela*, *amicitia*, *hospitium*, alliances of different kinds, treaties on a basis of equality with their usual provisions for ensuring a reciprocal legal

pp. 58 seq.; S. Gianzana, *Lo straniero nel diritto civile italiano* (Torino, 1884), vol. i. pp. 68-86: "La condizione giuridica dello straniero presso i Romani"; Voigt, *Das ius naturale* . . . vols. i. and ii. *passim*.

¹ Sall. *Catil.* 51.

² vi. 25.

protection, and for the enjoyment by the contracting parties of certain civil rights in each other's country.

The municipal law was more and more extended for the benefit of friendly aliens, in the first place by conceding *recuperatio*, *connubium* and *commercium*, then by granting the *ius nexi mancipiique*, until we get the evolution of the elaborate body of the law of nations, the *ius gentium*.¹ We find distinct germs of the profoundly important conception of a *comitas gentium*. There are to be found numerous examples of conventions securing an interchange of the rights of private law, as in the case of the *ισοπολιτεία*² of the Hellenic peoples, but resting more firmly than did the Greek isopolity on specific legal dispositions. There are to be found provisions regulating the competence of the tribunals, which is usually made to depend, so far as contractual transactions are concerned, on the *lex loci contractus*. Thus, in the *foedus Cassianum* (493 B.C.), a treaty stipulating perpetual peace between the Romans and the Latin cities, there was a provision that suits arising out of private contracts should be determined by the Courts of the place where the engagement was concluded: τῶν τε ιδιωτικῶν συμβολαίων αἱ κρίσεις ἐν ἡμέραις γιγνέσθωσαν δέκα, παρ' οἷς ἂν γένηται τὸ συμβόλαιον.³

Modification
of the
municipal law.

¹ Cf. Voigt, *Das ius naturale* . . . vol. ii. §§ 5, 13 seq. §§ 65 seq.

² See *supra*, pp. 141 seq.

³ Dion. Hal. vi. 95.—For the full treaty as reported by Dionysius, see *infra*, the latter part of chap. xvi.

CHAPTER X

ROME AND FOREIGNERS.—DIFFERENT CLASSES, AND THEIR JURIDICAL POSITION

Classes of
aliens.

As to the rights allowed to peregrins and those refused to them, it is important to distinguish between the three classes of aliens,—‘barbarians’, ordinary peregrins, and Latin peregrins.

The
barbarians.

The barbarians¹ (frequently referred to as *alienigeni*) were conceived to be those people inhabiting territories distant from the Roman world, taking no cognizance of its laws, living in independence of Rome, and having no regular relationships with her. They were usually regarded as not living under a duly organized political constitution, and consequently as being, in many respects, outside the family of nations. At first the term ‘barbarian’ was applied by the Romans, as by the Greeks, to persons speaking a foreign language, then to such as were outside the limits of Graeco-Roman civilization. Much later, under the Empire, a distinction was drawn between the *gentes exterae non foederatae*, and *peregrini* or *provinciales*. They were not admitted on Roman territory, except by an extraordinary concession granted but rarely, and only in individual cases; and, occasionally, by special compacts some of them were prohibited from settling in certain districts, even when these were beyond

¹ On the condition of the barbarians, especially those residing within the territory of the later Roman Empire, cf. É. Léotard, *Essai sur la condition des barbares établis dans l'empire romain au quatrième siècle* (Paris, 1873).

the bounds of the Roman Empire.¹ Large restrictions were, under the later emperors, placed on the commercial relationships of Romans with the barbarians.² In theory, Roman jurisprudence granted them no rights whatever; they were even held to be incapable of enjoying the provisions of the *ius gentium*. They existed only to be subjugated. Their property, like that of regular *hostes*, was considered to be *res nullius*, which anyone might acquire by simple occupation.³ When conquered, they might be reduced to slavery.⁴ Their graves were less protected than those of slaves,⁵ and were not *res religiosa*; hence they could be violated with impunity, since the 'barbarians' were—at least, theoretically speaking—in the eyes of the Romans in the position of enemies.⁶ In 365 A.D., a constitution was issued by the Emperors Valens and Valentinian to the effect that marriage between Romans and barbarians was a capital offence.⁷ Indeed, as Ortolan expressed it, barbarians were in theory regarded by the Romans as existing outside civilization and geography,—“hors de la civilisation et de la géographie.” In practice, however, this rigid attitude was somewhat modified; in most cases we find this seemingly extreme rigour largely mitigated. Peaceful association between them and Romans was by no means uncommon. Under Marcus Aurelius, they were even admitted into the Roman army as auxiliary forces;

¹ Dion Cassius, lxxi. 11, 15, 16, 19; lxii. 13.

² *Cod. Just.* iv. 40. 2; iv. 41. 1 and 2; iv. 63. 2.

³ *Dig.* xlix. 15 (de captiv. et de postlim.), 5. 2.

⁴ *Ibid.*: “. . . et liber homo noster ab eis captus servus fit et eorum. . . .”

⁵ *Dig.* xi. 7 (de religiosis et sumptib. fun.), 2. *pr.*: “Locum in quo servus sepultus est religiosum esse Aristo ait.”

⁶ *Dig.* xlvii. 12 (de sepulchro violato), 4,—where Paulus says that no action would lie against anyone who removed stones from enemies' tombs: “Sepulchra hostium religiosa nobis non sunt: ideoque lapides inde sublato in quemlibet usum convertere possumus; non sepulchri violati actio competit.”

⁷ *Cod. Theod.* iii. 14. 1.

under Claudius, the successor of Gallienus, we find them in the legions ; and under Constantine actually in the imperial body-guard.

Dediticii.

Almost on an equality with the condition of the barbarians was frequently that of the *dediticii*.¹ People who were conquered and reduced to this condition were necessarily regarded as having been divested of all their former rights and privileges, and as enjoying no political or civil capacity whatever beyond what the conquerors were pleased to concede to them.² They were obliged to surrender to their conquerors themselves, their arms, their cities, their territory, their temples, and their property—all things human and divine—" . . . urbem, agros, aquam, terminos, delubra, utensilia, divina humanaque omnia."³ But in their case also, as in that of the barbarians, the severe theory of the law was from time to time considerably relaxed. In the development of legal institutions in all countries and at all times we constantly find the strict letter of the law giving way to broader conceptions and more accommodating practice. Sometimes the Roman conquerors allowed their *dediticii* a certain measure of autonomy, leaving them all or part of their former laws,—hence designated the *ius dediticiorum* ;⁴ and on some occasions even granted them a *ius privatum*, as, for example, in the case of Capua.⁵

It is to be noted that the term *dediticii* denotes also the lowest class of freedmen, which had been established by the *lex Aelia Sentia* (4 A.D.),—"pessima libertas eorum et qui dediticiorum numero sunt."⁶ Their position was assimilated to that of slaves. They differed from ordinary peregrins, inasmuch as they did not belong to any city, whose laws they might otherwise be capable of

¹ Cf. Voigt, *Das jus naturale* . . . vol. ii. pp. 255-302 ; pp. 884-911 ; Karlowa, *op. cit.* pp. 282 *seq.* ; pp. 292 *seq.* ; and see *infra*, chap. xxiv., as to the Roman practices in war with regard to the *peregrini dediticii*.

² Gaius, i. 14.

³ Liv. i. 38 ; iv. 30 ; vi. 8 ; viii. 1 ; xxviii. 34 ; xxxvii. 45 ; xl. 41 ; Caes. *Bell. Gall.* i. 27 ; ii. 32 ; Polyb. xx. 9. 10 ; xxvi. 2.

⁴ Liv. xxxiii. 5, 9.

⁵ Liv. ix. 20.

⁶ Gaius, i. 26.

enjoying.¹ They could never acquire Roman citizenship, or even the rights of latinity—*ius latinitatis*.

As to the peregrins,² it is important to recollect that *Peregrini*. the term *peregrini*, as used by the Roman jurists, includes various classes of individuals: (1) Prior to Caracalla's constitution, the inhabitants of most of the Roman provinces; (2) the subjects of foreign States existing in friendly relationships with Rome; (3) Romans who had lost the *civitas* by *capitis deminutio minor*; ³ (4) freedmen who were *dediticiorum numero*.⁴

Ordinary peregrins (comprising mainly those of the second class above) were, apart from special concessions by convention or otherwise, and apart from subsequent extensions, also deemed to be outside the sphere of the Roman civil jurisprudence. The *ius civile* was regarded as a system of law reserved for citizens alone. Its political rights, such as the *ius suffragii*, the right of voting in the popular assemblies, and the *ius honorum*, the capacity to occupy the praetorship, the consulship, and other Roman magistracies, were strictly denied to peregrins, as were also the most important private rights. Thus, they were debarred from the *ius connubii*; they were incapable of *iustae nuptiae* on Roman territory unless specific grants to that effect were formally made. As Ulpian says: "Connubium habent cives Romani cum civibus Romanis; cum Latinis autem et peregrinis ita si concessum est."⁵ Absence of *connubium* naturally

Ordinary
peregrins.

Rights
withheld from
them.

¹ Ulpian, *Regulae*, xx. 14.

² Cf. Voigt, *op. cit.* vol. ii. pp. *8 *seq.*; Voigt, *XII. Tafeln*, vol. i. §§ 24, 28; Van Wetter: "La condition civile des étrangers d'après le droit romain" (appendix to Laurent's *Droit civil international* (Brussels, 1880), vol. i. pp. 667 *seq.*); G. Humbert, *Mémoire sur la condition des pèrègrins chez les Romains* (in *Recueil de l'Académie de législation de Toulouse*, 1870).

³ On the deprivation of civic rights and its varying degrees, see *Dig.* iv. 5. 11; *Just. Inst.* i. 16; *Cic. De Orat.* i. 40; *Brut.* 36; *Verr.* ii. 2. 40; *Top.* 4.

⁴ Ulpian, *Regulae*, xx. 14; Gaius, i. 13.

⁵ *Reg.* v. 4; cf. Gaius, i. 57.—As to such formal concessions, see the *Privilegia militum veteranorumque de civitate et connubio* in *Corp.*

implied the absence of the corollary rights of *manus* (marital power), *patria potestas* (power over the *filii-familias*), adoption, agnation, inheritance *ab intestato*. Similarly, peregrins were debarred from the *ius commercii*, and its corollaries,—*dominium en iure Quiritium* (Quiritary ownership), and certain modes of acquiring property, such as *mancipatio* (imaginary alienation by means of the scale and ingot), *cessio in iure* (surrender before a magistrate), *usucapio*, *adiudicatio* in one of the actions *communi dividundo* and *familiae erciscundae* (claiming partial ownership and partial succession), and *finium regundorum*. If a peregrin was granted *commercium*, he thus obtained an express right to enter into bilateral engagements (*mancipatio*, *nexum*, *usucapio*), to acquire, hold, and transfer property of all kinds in accordance with the provisions of the civil law; and it included also the *testamenti factio*, the capacity to institute or be instituted an heir. But it is important to remember that absence of *commercium* did not necessarily mean absence of daily intercourse, commercial or otherwise, with foreigners, for it proceeded in conformity with the regulations established by the *praetor peregrinus*. The incapacity as to Quiritary ownership, mentioned above, did not apply, however, to the case of provincial land, for which purpose the possession of the *ius italicum*¹ sufficed;—Italic soil being acquirable and transferable by mancipation and usucapion. Finally, tutelage of minors was denied to them, as well as the different modes of emancipating slaves, the use of the formula *spondesne spondeo*² in entering into engagements, the use

inscrip. Lat. vol. iii. 843-919; L. Renier, *Recueil de diplômes militaires* (Paris, 1876), *passim*; and cf. Piccioni, *Des concessions du connubium* (Paris, 1891).

¹ As to the *ius italicum*, cf. Savigny, *Vermischte Schriften*, 5 vols. (Berlin, 1849, etc.) vol. i. pp. 29-80; E. Beaudouin, *Etude sur le jus italicum* (in *Nouvelle revue historique du droit français et étranger*, t. v. pp. 146 *seq.*, pp. 592 *seq.*); R. Beaudant, *Le jus italicum* (Paris, 1889); J. Marquardt, *Römische Staatsverwaltung* (Leipzig, 1881), vol. i. pp. 89 *seq.*

² Gaius, iii. 93-4.

of *nomina transcriptitia* (transcriptive entries of debit or credit in a journal), at least of the form *a persona in personam* (that is, the substitution or exchange of a debt owed by C to B, in discharge of a debt owed by B to A).¹

But with the development of the *ius gentium*, the position of peregrins became ameliorated. The praetorian jurisprudence, as the greatest of Roman jurists, Papinian, said, arose out of the necessity to assist, supplement, or rectify the civil law, in view of public utility: "*Ius praetorium est quod praetores introduxerunt, adiuvandi vel supplendi, vel corrigendi iuris civilis gratia, propter utilitatem publicam.*"² (There is no need to trace here the rise and development of the praetor's jurisdiction and legislation, which is a subject treated more appropriately in works on Roman private law.) The *ius praetorium* was "docile aux enseignements de la philosophie";³ and through its instrumentality an increasing number of principles continued to be embodied in the *ius gentium*, recognizing, on the basis of natural equity and public utility, various rights in alien subjects, and even in those who were without any *certa civitas*. And, further, where such new provisions were found in practice inadequate for the determination of the rights and duties of peregrins, and for the settlement of conflicts that might arise amongst them, an application of their law of origin (*lex peregrinorum*) was not infrequently made, and the principle involved therein was, if not detrimental to public interest, materialized in the *ius gentium*. Thus the law relating to peregrins consists, as Girard has pointed out, partly of certain Roman civil provisions expressly extended

Rights allowed to ordinary peregrins by the *ius gentium*.²

Nature of peregrin law.

¹ *Ibid.* iii. 130.

² Cf. Weiss, *Droit inter. privé*, vol. ii. pp. 26 *seq.*—On the general inapplicability of Roman laws to peregrins, cf. M. Wlassak, *Römische Prozessgesetze* (Leipzig, 1888-91), part ii. pp. 141-182.

³ *Dig.* i. 1 (de iust. et iure), 7. 1.

⁴ Weiss, *op. cit.* vol. ii. p. 27.

to them (as where a decree of the senate rendered applicable to them the rule in the *lex Aelia Sentia*, making void such manumissions as were effected in fraud of creditors¹), partly of their own national laws, and partly of the law of nations. "Leur droit est constitué, en dehors des rares lois romaines dont l'application leur a été expressément étendue . . . par leurs lois nationales et par le droit des gens. Les pérégrins vivent sous l'empire de leurs lois nationales, dans la mesure où l'exercice leur en a été laissé après leur soumission, notamment au moment de l'organisation de la province."²

Marriage—
matrimonium
non iustum.

Peregrins could contract marriage—taking the form of *matrimonium non iustum, non legitimum*—to which many provisions of the civil law were applicable. They were capable of adoption if carried out in accordance with the formalities of their law of origin; and, under the same conditions, they were capable of *tutela*³ (guardianship), and of *curatela*⁴ (curatorship of a minor after release from wardship). They were allowed *dominica potestas* with regard to their slaves, and its corollary rights, viz. acquisition *per servum*, the power of life and death (*ius vitae necisque*), and the right of manumission by their respective national laws.⁵ They were permitted to acquire property by the various modes of the *ius gentium*, e.g. by *traditio* (delivery of possession), *occupatio* (of things which previously had no owner); as a substitute for the civil *usucapio*, the

Acquisition of
property.

¹ Gaius, i. 47: "... lege aelia sentia cautum sit, ut creditorum fraudandorum causa manumissi liberi non fiant, hoc etiam ad peregrinos pertinere (senatus ita censuit ex auctoritate Hadriani. . .)"

² P. F. Girard, *Manuel élémentaire de droit romain* (Paris, 1901), p. 110.

³ Gaius, i. 189, 193.—Cf. Humbert, *Mémoire sur la condition des pérégrins chez les Romains*, loc. cit. p. 19.

⁴ Gaius, i. 197, 198.

⁵ See *Corp. inscrip. Graec.* vol. ii. p. 1005, no. 2114bb; Plin. *Epist.* x. 4; and cf. Dosithaeus, *Disputatio forensis de manumissionibus* (in P. F. Girard, *Textes de droit romain*, § 12).

praescriptio longi temporis (possession for ten years during the presence of the previous owner, and for twenty years during his absence) was organized in their favour; and, in like manner, with regard to *fideicommissa* Trusts. (trusts; dispositions in the form of entreaty, *precativo modo*).

On provincial territory, peregrins were able to exercise the rights of personal or predial servitude, *emphyteusis* (grant of land in perpetuity, or for a term of years, for an annual rent), *superficies* (right to perpetual enjoyment of anything built upon land, on payment of an annual rent), *hypotheca*¹ (mortgage). They were admitted to successions *ab intestato* in Rome, when proceeding conformably to the laws of their nation. The majority of the contracts of Roman legislation, appertaining to the *ius gentium*, were open to them, e.g. sale, hire, partnership, mandate, deposit, loan. "The law of nations," we read in the *Institutes* of Justinian, "is the source of almost all contracts, such as sale, hire, partnership, deposit, loan for consumption and very many others."² They could enter into contracts *verbis*, with the exception of the formula *spondesne spondeo*; and hence they were capable of *fidepromissio* (suretyship by stipulation, attachable only to a verbal contract), and *fideiussio* (suretyship by stipulation, attachable to any contract); and also of *novatio* (transvestitive facts), and *acceptilatio* (release of stipulation). As regards the contracts *litteris*, they could enter into *chirographa* and *syngraphae*³ (detached written affirmations and acknowledgments of debts), and probably *transcriptio a re in personam* ("... when the sum which you owe me on a contract of sale, or letting, or partnership is debited to you in my journal as if you had received it as a loan"⁴). Thus Gaius says: "Whether transcriptive debits

Rights of
peregrins on
provincial
territory.

¹ Gaius, ii. 31; cf. *Dig.* xlviii. 22 (de interd. et releg.), 15, *pr.*

² i. 2: "Ex hoc iure gentium et omnes paene contractus introducti sunt, ut emptio venditio, locatio conductio, societas, depositum, mutuum et alii innumerabiles."

³ Gaius, iii. 134.

⁴ Gaius, iii. 129.

constitute a binding obligation in the case of aliens has been doubted with some reason, for this contract is an institution of civil law, as Nerva held. Sabinus and Cassius, however, held that transcription from thing to person forms a contract binding on aliens, though not transcription from person to person."¹ They were allowed the *cautio damni infecti*² (giving security against apprehended damage), and also to enter into pacts and innominate contracts, sanctioned by the action *praescriptis verbis* (an equitable action to recover not merely the value conveyed, but also compensation for the loss suffered through the defendant's default of specific performance).

Extinction of obligations and *ius gentium*.

Respecting the extinction of obligations, the various modes thereof were likewise related to the *ius gentium*, so that apart from *novatio* and *acceptilatio*, the peregrins could resort to actual performance (*solutio*), to *mutuus dissensus*, to compensation, to prescription, according to the circumstances of the particular case. The imaginary payment *per aes et libram* was never allowed to them.³

Rights of bringing actions.

As to the right of bringing actions, the institution of *recuperatio*⁴ was at first organized for the benefit of peregrins. But when this had disappeared (as it had done by the time of Gaius), the praetorian jurisprudence introduced modified actions (*actiones utiles*, or *ficticiae*) which, by a legal fiction considering the peregrins for the time being as Roman citizens, enabled them to bring penal actions of the civil law, such as the *actio furti* (for theft), the *actio iniuriarum*, and *actio de lege Aquilia*

¹ iii. 133: "Transscripticiis vero nominibus an obligentur peregrini, merito quaeritur, quia quodammodo iuris civilis est talis obligatio; quod Nervae placuit. Sabino autem et Cassio visum est, si a re in personam fiat nomen transscripticium, etiam peregrinos obligari; si vero a persona in personam, non obligari."—Cf. E. Chénon, *Études sur les controverses entre Proculiens et Sabinien* (Paris, 1881), no. 19.

² Cf. *Corp. inscrip. Lat.* i. p. 116; and see Voigt, *Das jus nat.* vol. ii. pp. 732 seq.

³ Gaius, iii. 173, 174.

⁴ See *infra*, chap. xvii., latter part.

(for damage to property). As Gaius states : "An alien is feigned to be a Roman citizen if he sue or be sued in an action which may justly be extended to aliens. . . . If an alien sue for theft or sue or be sued under the Aquilian law for damage to property, he is feigned to be a Roman citizen."¹

It has been held by writers, like Keller, Mommsen, Van Wetter, and certain others, that the concession of *commercium* to peregrins carried with it the right to resort to the *legis actiones* (statute-process), by means of the *actiones ficticiae*, or the intervention of a procurator. But there are certain difficulties involved in this view. In opposition it may be urged, as Muirhead has argued,² that the fictitious actions were first introduced by the praetors, when the *legis actiones* were already becoming obsolete, that the system of *legis actiones* recognized no such general institution as the procuratory³ (because it

Did *commercium* imply use of *legis actiones*?

¹iv. 37 : "Item civitas Romana peregrino fingitur, si eo nomine agat aut cum eo agatur, quo nomine nostris legibus actio constituta est, si modo iustum sit eam actionem etiam ad peregrinum extendi. . . . Item si peregrinus furti agat, civitas ei Romana fingitur. Similiter si ex lege Aquilia peregrinus damni iniuriae agat aut cum eo agatur, ficta civitate Romana iudicium datur."—In connection with this passage, Mommsen refers to the earlier system of *recuperatio*, by which peregrins could take certain criminal proceedings against Roman citizens, and distinguishes between the special forms of delictual actions by and against aliens in the earlier epoch from the substituted fictitious actions of the later period. "Als Beispiele werden die Diebstahls- und die Sachbeschädigungsklage activ und passiv angeführt. Daraus folgt, dass die Privatdelictsklagen an sich nicht von einem oder gegen einem Peregrinen haben angestellt werden können, aber keineswegs, dass bis zu der verhältnissmässig wohl späten Epoche, wo sie durch Fiction ihnen eröffnet wurden, es für Fälle dieser Art keine Rechtsverfolgung gegeben hat. Vielmehr finden wir schon im sechsten Jahrhundert die Diebstahlklagen von Peregrinen gegen Römer durch Recuperatoren entschieden. . . ohne Zweifel gab es dafür in älterer Zeit besondere Klagen, die nachher durch das Eintreten jener Fiction überflüssig wurden" (*Das römische Staatsrecht*, vol. iii. p. 606 note).

²Note 3, pp. 103-4, *op. cit.*

³Gaius, iv. 82.—Cf. Just. *Inst.* iv. 10 pr., where cases are mentioned in which representation was allowed in statute-process : "Cum olim in usu fuisset alterius nomine agere, non posse, nisi pro populo, pro

stopped short at *pronuntiatio*, and hence was not able to substitute the procurator's name for the principal's), that the *iudicia legitima* of which the *legis actiones in personam* were the earliest forms required both parties and judge to be Roman citizens,¹ and finally, that if the *legis actiones* had been applicable, *recuperatio* would have been superfluous.

Rights allowed
to Latin
peregrins.

By treaties between Rome and foreign countries, a reciprocity of *recuperatio* and *ius commercii*, and sometimes even *ius connubii*, was secured for the subjects of the contracting parties. In the alliances with the Latin cities usually all the three rights were stipulated expressly or conceded impliedly. Thus in the case of the *foedus Cassianum*² of the year 493 B.C., no mention was specifically made of *connubium*, on the grounds that it was clearly understood. Similarly wide rights and privileges were provided for in the treaty with the Hernici, 486 B.C., when they were admitted into the Latin confederation, in that with the Campanians, 340 B.C., and in some cases with the Samnites, as, for example, in 290 B.C. In the majority of cases, however, *connubium* (the most important private right), was not included in treaties, *recuperatio* and *commercium* being alone agreed upon. In other instances, only *amicitia* formed the basis of treaty relationships securing for the most part certain privileges of commercial intercourse.

Judicial
position of
Latin
peregrins.

Classification
of Latin
peregrins.
The *Latini*
veteres.

The Latin peregrins³ occupied an intermediate juridical position between the Roman citizens and peregrins proper. From the point of view of their origin, they may be divided into three classes,—the *Latini veteres* (or *prisci*), the *Latini coloniarii*, and the *Latini Iuniani*.

The *Latini veteres* were the inhabitants of Latium—

libertate, pro tutela." That is, in public actions it was permissible, as well as in actions by an *assertor libertatis*, and those on behalf of a ward.

¹ Gaius, iv. 104, 109.

² As to the *foedus Cassianum*, see *infra*, chap. xvi.

³ Cf. Weiss, *Droit inter. privé*, vol. ii. pp. 38 *seq.*

the members of the league of the thirty Latin towns (*nomen latinum*)—with whom, at the time of the second consulship of Spurius Cassius, and after the battle of Lake Regillus, a treaty of alliance was concluded by Rome. At the end of the Latin war, in 338 B.C., this confederation was destroyed. Thus their history presents two phases,—firstly, their alliance with Rome on a footing of equality, more or less, and secondly, their subjection.

In the earlier epoch, special conventions secured them important civil rights, both public and private. These Latini were not necessarily debarred from the *ius suffragii*, for those who were present in Rome at the time of the meeting of the *comitia tributa* were allowed to vote in a tribe designated by lot.¹ They had access to the Roman legions.² It appears they had *connubium*,³ but undoubtedly it was so with certain limitations; for they would not have been allowed to occupy in this respect a footing of perfect equality with Roman citizens. Probably the privilege consisted simply of a right of intermarriage,⁴ enabling a Roman citizen to marry an alien woman, and *vice versa*, so that in the respective cities the union was acknowledged as *iustae nuptiae*. But the husband did not possess *manus* over his wife, who, remaining a *peregrina*, made it impossible to adopt the modes of *confarreatio* or *coemptio*; his children by

¹ Appian, *De bell. civ.* i. 23; Dion. Hal. viii. 72: καὶ μετεπέμπετο Λατίνων τε καὶ Ἑρνίκων ὅσους ἐδύνατο πλείους ἐπὶ τὴν ψήφοφορίαν.—Cf. Liv. xxv. 3.

² Liv. xl. 18; cf. C. Accarias, *Précis de droit romain*, 2 vols. (Paris, 1879, etc.), vol. i. p. 93, note 2.

³ Cf. Voigt, *Das jus nat.* vol. i. pp. 140 seq.; J. Marquardt, *Römische Staatsverwaltung*, vol. i. p. 24; Walter, *op. cit.* § 227; E. Beaudouin, *Le majus et le minus Latium* (in *Nouvelle Revue historique de droit français et étranger*, 1879).—It is denied by C. A. von Vangerow (*Über die Latini Juniani*.—*Eine rechtsgeschichtliche Abhandlung*, Marburg, 1833, pp. 18, 21), relying on the text of Gaius, i. 79, from which it appears the *lex Minicia* was applicable to them.—But cf. Weiss, *op. cit.* vol. i. p. 35.

⁴ Muirhead, *op. cit.* p. 107.

her, however, were in his *potestas*.¹ They enjoyed *commercium*, had the capacity to enter into contracts *litteris*,² and could avail themselves of the procedure of *recuperatio* (which was often described as *actio* in the treaties).

In the later epoch, after the dissolution of the Latin confederation, those to whom *civitas* was not extended were regarded as conquered peoples. They had no political rights, and no *connubium*, and at first no *commercium*. "Caeteris Latinis populis connubia commerciaque et concilia inter se ademerunt."³ But they soon acquired the *ius commercii*,⁴ which, henceforth characterizing the *ius Latii*, pointed to the distinction between the Latin peregrins and the ordinary peregrins.

The *Latini coloniarii*.

The *Latini coloniarii* were the first Latin colonists that date back to the time of the Roman alliance with the cities of the Latin league. They may be divided into three classes,—firstly, those who voluntarily emigrating of necessity renounced Roman citizenship, secondly, those individuals who having been condemned to pay a fine avoided payment by expatriating themselves, and thirdly, the *filiifamilias*, who by their father's orders enrolled their names in a colony.⁵ All these acquiring the *ius Latinitatis* at the same time lost the *ius civile*.

As to their condition, it was very much similar to that of the later *Latini veteres*, that is, after the breaking up of the Latin league. So that they were debarred from all political rights, and from *connubium*,⁶ but enjoyed *commercium*,⁷ including *testamentifactio*; hence,

¹ See Karlowa, *Röm. Rechtsg.* vol. ii. p. 70.

² Liv. xxxv. 7.

³ Liv. viii. 14; cf. also Liv. ix. 24, 43.

⁴ Liv. xli. 8. Cf. Marquardt, *op. cit.* p. 53, note 5, who, relying on this passage of Livy, says: "Dies geht namentlich daraus hervor, dass ein Latiner seine Kinder einem Römer mancipiren konnte."

⁵ Cic. *Pro Caecina*, 33; Gaius, i. 131: "Olim quoque quo tempore populus Romanus in Latinas regiones colonias deducebat, qui iussu parentis in coloniam Latinam nomen dedissent, desinebant in potestate parentis esse, quia efficerentur alterius civitatis cives."

⁶ Ulpian, v. 4.

⁷ *Ibid.* xix. 4.

their position was somewhat above that of ordinary peregrins. Girard points out that their family relationships were regulated by their national laws, varying somewhat according to local legislations, and that, owing to their common origin, they bore a great resemblance to the Roman institutions. "Leurs rapports de famille sont régis par leur droit national, qui peut varier suivant les statuts locaux, mais qui, par suite de la communauté d'origine, présente, sauf un caractère d'archaïsme plus prononcé, une similitude à peu près complète avec les institutions romaines."¹

It has, however, been maintained by Savigny² that the Latini coloniarii had no *commercium*. He bases his contention on a passage of Cicero, according to which, as he interprets it, *commercium* was conceded only as a reward to the twelve (or eighteen, XIII) Latin colonies that remained faithful to Rome during the Second Punic War. Now the passage of Cicero runs to this effect: "He [Sulla] wants them [viz. the Volaterrani] to be treated on the same juridical footing as the inhabitants of Ariminium; now who is not aware that the latter enjoy the same rights as the twelve colonies, and that they can inherit from Roman citizens?"³ Nothing is here said or even implied as to a new concession of *ius commercii*;⁴ the passage simply states that Sulla deprived Volaterra (as well as other *municipia*) of many of the rights and privileges of citizenship, and allowed them to retain only *commercium*, thus placing

Had the Latini
coloniarii the
ius commercii?

¹ *Man. élém. de dr. rom.* p. 108.—*Ibid.* p. 108, note 1: "La table de Salpensa cc. 21, 22, 23 prouve par exemple un régime très analogue à celui de Rome pour la patria potestas, la manus, le mancipium, les affranchissements."—The laws of Domitian organizing the government of Salpensa (a Latin colony in Baetica, between Hispalis (Seville), and Gades (Cadiz)), and that of Malaca were discovered in 1851; cf. *Corp. inscrip. Lat.* 1963.

² *Vermischte Schriften*, vol. i. pp. 20-26; vol. iii. pp. 301, 302.

³ *Pro Caec.* 35: "Iubet enim eodem iure esse, quo fuerint Ariminenses, quos quis ignorat duodecim coloniarum fuisse, et a civibus Romanis hereditates capere potuisse?"

⁴ Cf. Weiss, *op. cit.* vol. ii. p. 40.

them on the same basis as the twelve Latin colonies, to whose condition that of Ariminum was assimilated.¹ Besides, it appears from Ulpian² that the Latini possessed *commercium*: "Mancipatio locum habet inter cives Romanos et Latinos coloniarios, Latinosque iunianos eosque peregrinos quibus commercium datum est." And, further, the right was enjoyed by the Latini Iuniani, whose position, as Gaius says,³ was based on that of the Latini coloniarii.

The Latini
Iuniani.

The *Latini Iuniani* obtained their name in the first place from the *lex Iunia Norbana* (c. 18 A.D.) which determined their legal character, and, secondly, from the Latini coloniarii, to whom they were largely assimilated. They were manumitted slaves, in whom their master had not quiritary property, or to whom he had given liberty in a manner outside the solemn forms of emancipation, or conditions imposed by the *lex Aelia Sentia* (A.D. 4). Their position resembled that of the Latini coloniarii, inasmuch as they had *commercium*⁴ and not the *ius suffragii* and *connubium*; and also differed from it in that the Latini coloniarii had by their *commercium* certain privileges from which the Latini Iuniani were debarred. Thus the latter could not make wills or benefit under another's will, and could not be appointed guardians under a testament.⁵ Hence, having neither *sui heredes* (i.e. immediate lineal successors) nor agnates (i.e. collateral relatives, as eventual successors), their property went to their patrons "iure quodammodo peculii," by the title of *quasi peculium*.⁶

¹ As to the inequality of rights of Latin colonies, cf. Mommsen, *Geschichte des röm. Münzwesens*, pp. 182, 309, etc., where he deals with the relationship between independence and the right of coinage; Marquardt, *op. cit.* vol. i. p. 55; Rudorff, *op. cit.* vol. i. p. 30; and the other works, previously referred to, on the Latini.

² xix. 4.

³ i. 22.

⁴ Ulpian, xix. 4.

⁵ Gaius, i. 22, 24; Ulpian, xx. 8.

⁶ Gaius, iii. 56; Just. *Inst.* iii. 7. 4.

CHAPTER XI

ROME AND FOREIGNERS.—DOMICILE. NATIONALITY. NATURALIZATION

TOWARDS the end of the Republic, and in the earlier period of the Empire, when the Roman constitution had perhaps attained to its fullest development, the various constituent parts of the Empire in Italy included *civitates* (apart from Rome), *municipia*,¹ colonies, and various secondary communities. Each possessed its own constitution, providing for a greater or lesser independence, its own magistrates, its own jurisdiction, and even its special legislation.²

Parts of the
Roman
Empire.

It was possible at this time (as it is in our own age) for an individual to be attached to a community by two different ties,—*origo* and *domicilium*. Through the first he was a *civis* or *municeps* as the case may be; by virtue of the second, he was an *incola*, so that the expression ‘*incola esse*’ and ‘*domicilium habere*’ are, for practical purposes, equivalent.³ Individuals became *cives* by birth, adoption, emancipation, admission; they became *incolae* by domicile. “*Cives quidem origo*,

The ties of
origo and
domicilium.

¹ Aulus Gellius (xvi. 13) thus defines *municipes*: “*Municipes . . . sunt cives Romani ex municipiis legibus suis et suo iure utentes, muneris tantum cum populo Romano honorari participes, a quo munere capessendo appellati videntur, nullis aliis necessitatibus neque ulla populi Romani lege adstricti, nisi in quam populus eorum fundus factus est.*”

² Cf. Savigny, *System des heutigen römischen Rechts*, 9 Bde. (Berlin, 1840-1851), vol. viii. §§ 351 seq.

³ *Dig.* l. 1. 5.

Double
citizenship.

manumissio, allectio, vel adoptio, incolas vero . . . domicilium facit.”¹ The Roman jurisprudence did not recognize the capacity in an individual to be a *civis* or *municeps* in two cities at one and the same time. “Duarum civitatum,” as Cicero says in a passage already referred to, “civis esse nostro iure civili nemo potest.”² But it was then possible, as it is by the modern law of nations, to be a *civis* or *municeps* in one country and an *incola* in another. “Cum te Byblium origine, incolas autem apud Berytios esse proponis, merito apud utrasque civitates muneribus fungi compelleris.”³ So that in the latter case a peregrin could avail himself of two different systems of law, viz. that of the city of which he is a *civis*, and that of the city in which he is merely domiciled. Hence conflicts of legislations would naturally arise; and it will be considered later whether such conflicts were adjusted by the *ius originis*, or by the *lex domicilii*, in those cases where the Roman law admitted the application of the peregrin law.

Acquisition of
domicile.
Factum and
animus.

An independent individual could acquire a domicile of choice by the actual fact of residence (*factum*), combined with the intention of permanent (or at least indefinite) residence (*animus manendi*). These two elements were insisted on by the Roman law, as much as they are in the modern legislations. Thus the *Digest* states: “Domicilium re et facto transfertur, non nuda contestatione; sicut in his exigitur, qui negant se posse ad munera, ut incolas vocari.”⁴

Married
woman.

A married woman generally acquired the same

¹ *Cod. Just.* x. 30 (de incolis), 7.

² *Pro Balbo*, 11; cf. *Pro Caec.* 34.—See the present writer's article on Zouche (“The Great Jurists of the World,”—in *Journal of the Society of Comparative Legislation*, London, April, 1909, New Series, no. xx. pp. 281-304, at pp. 291-2).

³ *Just. Cod.* x. 39 (de municipibus et originariis), 1, (Imp. Antonius A. Silvano); cf. Ulpian, in *Dig.* l. 4. 3. 1.

⁴ l. 1 (ad municipalem et de incolis), 20.

domicile as her husband (*domicilium matrimonii*). "Item rescripserunt mulierem, quamdiu nupta est, incolam eiusdem civitatis videri, cuius maritus eius est, et ibi, unde originem trahit, non cogi muneribus fungi."¹ A widow preserved her domicile so long as she did not marry again, or acquire a different one in some other manner. "Vidua mulier amissi mariti domicilium retinet exemplo clarissimae personae per maritum factae; sed utrumque aliis intervenientibus nuptiis permutatur."²

Legitimate children took their father's domicile; but ^{Children.} later they could relinquish their original domicile and choose another.³ Natural children assumed the domicile of their mother.

A similar provision applied in the case of manumitted ^{Emancipated} slaves. At first they had the domicile of their patron; ^{slaves.} and later they were at liberty to acquire a different one.⁵

An individual could have more than one domicile at ^{Plurality of} the same time,—a fact which is also possible in modern ^{domiciles.} times.⁶ The law of nations regarding warfare has for a long time recognized a trade or war domicile, in addition to the domicile of origin; though, it must be admitted, a 'commercial domicile,' or a 'forensic domicile' does not fully amount to domicile in the proper sense of the

¹ Dig. l. 1. 38. 3.—Cf. *ibid.* v. 1 (de iud.), 65; xxiii. 2 (de ritu nupt.), 5: "...deductione enim opus esse in mariti, non in uxoris domum, quasi in domicilium matrimonii." See also *Just. Cod.* x. 38 (de incolis), 9; *ibid.* xii. 1 (de dignit.), 13.

² Dig. l. 1 (ad mun.), 22. 1.

³ Dig. l. 1 (ad mun.), 3, 4, 6 § 1, 17 § 11.

⁴ Dig. l. 1 (ad mun.), 6. 3; and *ibid.* 22, *pr.*

⁵ Dig. l. 1 (ad mun.), 22 § 2, 27, *pr.*; 37 § 1.

⁶ "I apprehend," said Pollock, C.B., "that a peer of England, who is also a peer of Scotland, and has estates in both countries, who comes to Parliament to discharge a public duty, and returns to Scotland to enjoy the country, is domiciled both in England and Scotland" (*In re Capdevielle* (1864), 33 L.J., Ex. 306, 316. Cf. *Somerville v. Somerville* (1801), 5 Ves. 749, 786; 5 R.R. 161, per Arden, M.R.).

word. In any case, probably in Rome, as certainly in the view, say, of the British courts, no individual could have more than one domicile for the same purpose, that is, for the determination of one and the same class of rights.¹ In the later Roman law, however, the principle of the simultaneous possession of two or more domiciles was less frequently applied, and was admitted only in exceptional cases.²

No domicile.

In modern legislations it is not possible to be without a domicile altogether;³ but in Roman legal theory this was not impossible, though in practice the contingency was naturally rare. It might occur in the interval between the renunciation of an acquired domicile and the acquisition of another (as, for example, when servants and workmen go in search of new employers), in the case also of such travellers as, having abandoned their original domicile, do not take up a residence of a permanent nature, or for an indefinitely long period, and, finally, in the case of vagabonds. Thus, the *Digest*, referring to the difficulty of determining the

¹ "The facts and circumstances which might be deemed sufficient to establish a commercial domicile in time of war, and a matrimonial, or forensic, or political domicile in time of peace, might be such as, according to English law, would fail to establish a testamentary or principal domicile. 'There is a wide difference,' it was observed in a judgment delivered in a recent case before the Judicial Committee of the Privy Council, 'in applying the law of domicile to contracts and to wills'" (Sir R. Phillimore, *Commentaries upon International Law*, 4 vols. (London, 1885) sect. 54; and referring to *Croker v. Marquis of Hertford* (1844), 4 Moore, P.C. 339).

² *Dig. l. 1 (ad mun.)*, 5: "Labeo indicat eum, qui pluribus locis ex aequo negotietur, nusquam domicilium habere; quosdam autem dicere refert pluribus locis eum incolam esse aut domicilium habere; quod verius est."

Cf. *Dig. l. 1 (ad mun.)*, 6. 2: "Viris prudentibus placuit duobus locis posse aliquem habere domicilium, si utrobique ita se instruxit, ut non ideo minus apud alteros se collocasse videatur."—See also *ibid.* l. 1. 27. 2; and *Just. Cod. iii. 12 (de sepult.)*, 2, *pr.*

³ E.g. as to the English tribunals, cf. *Bell v. Kennedy* (1868), L.R. 1 Sc. App. 307; *Udny v. Udny* (1869), L.R. 1 Sc. App. 441, 453, 457, where the rule is clearly laid down by Hatherley, C., Lord Westbury, and Lord Chelmsford.

domicile of an individual who appears to reside equally in two places, goes on to enumerate instances where it is possible to have no domicile at all. "Celsus libro primo digestorum tractat, si quis instructus sit duobus locis aequaliter neque hic quam illic minus frequenter commoretur; ubi domicilium habeat, ex destinatione animi esse accipiendum. ego dubito, si utrobique destinato sit animo, an possit quis duobus locis domicilium habere. et verum est habere, licet difficile est; quemadmodum difficile est sine domicilio esse quemquam. puto autem et hoc procedere posse, si quis domicilio relicto naviget vel iter faciat, quaerens quo se conferat atque ubi constituat; nam hunc puto sine domicilio esse."¹

Now as to the question of nationality, original and acquired.

As has been fully explained in a previous chapter, the nations of antiquity were keenly jealous of their citizenship. According to strict conceptions the ancient city was an organized association of families, where "the nationality of the father had to answer for his children's patriotism."² At Athens, the child was a citizen if both the father and the mother were citizens. In Rome the theory of the *ius sanguinis* and the *ius soli* was applied with less stringency. With the Romans, legislation as well as politics possessed that elasticity which rendered rules and prescriptions adaptable to the varying circumstances of time and place.

The Roman ideas as to the determination of the nationality of origin, as approaching modern conceptions and in contradistinction to the more exclusive Hellenic notions, are pointed out by a sixteenth century writer in the following terms: "Recte Romanum interpretamur Roma oriundum, et in iure nostro semper

¹ Dig. l. 1 (ad mun.), 27. 2.

² Weiss, *op. cit.* vol. i. p. 33 (to which work this portion of the present chapter is indebted).

notatur origo paterna, non origo propria et natale solum."¹

Two cases are distinguished by the Roman jurists: firstly, if the child is issue of *iustae nuptiae*; secondly, if the child is issue of a marriage or union which is not *iustae nuptiae*.

As to issue *ex iustis nuptiis*.

In the first case, when the child is born *ex iustis nuptiis*, of a marriage sanctioned by the civil law, he assumes his father's nationality, as Gaius says: "*Semper connubium efficit, ut qui nascitur patris conditioni accedat.*"² As a rule this nationality will be the same as that of the mother also, inasmuch as the *iustae nuptiae* usually obtains between Roman citizens. The exceptional cases occur where the conferring of the *connubium* to Latins, and even to peregrins proper (though much more rarely), renders their union a regular and legitimate marriage, *iustae nuptiae*.

Marriage of Roman with Latin or alien woman.

If a Roman enter into legal marriage with a Latin or alien woman, the issue will, according to the general rule, be of Roman nationality. Thus Gaius: "If a Roman citizen takes to wife an alien with whom he has *connubium*, he thus contracts a civil marriage, and his son is born a Roman citizen and subject to his power."³

Soldiers of the praetorian and urban cohorts.

The right was generally conceded to soldiers of the praetorian and urban cohorts, after the expiration of their service, to enter into a *iustum matrimonium* with Latin or peregrin women. "... Veterans often obtain by imperial constitution a power of civil wedlock with the first Latin or alien woman they take to wife after the discharge from service, and the children of such

¹ J. de Cujas (Cujacius), *Observationum et emendationum libri xxviii.* (Coloniae Agrippinae, 1598).

² i. 80; cf. Ulpian, v. 8: "*Connubio interveniente, liberi semper patrem sequuntur*"; *Dig.* i. 5 (de statu hominum), 19: "*Cum legitimae nuptiae factae sunt, patrem liberi sequuntur.*"

³ i. 76: "... Si civis Romanus peregrinam cum qua ei connubium est, uxorem duxerit... iustum matrimonium contrahitur; et tunc ex his qui nascitur, civis Romanus est et in potestate patris erit." Cf. Gaius, i. 56, which is to the same effect.

marriages are born citizens of Rome and subject to paternal power.”¹ In such cases a formula to the following effect was commonly found in the official permission given to them: “Nomina speculatorum, qui in praetorio meo militaverunt . . . subieci; quibus fortiter et pie militia functis ius tribuo conubii dumtaxat cum singulis et primis uxoribus, ut etiam si peregrini iuris feminas matrimonio iunxerint, proinde liberos tollant ac si ex duobus civibus Romanis natos.”²

Again, if a Roman woman enter into legal marriage with a Latin or peregrin proper, it would appear from the general principle that the issue was to be Latin or peregrin, as the case may be, and, of course, was considered legitimate. And from the time of Hadrian, the issue was likewise legitimate even though there was not *connubium* between such parties. “If a Roman woman,” says Gaius, “marry an alien with whom she has capacity of civil marriage, her son is an alien and a lawful son of his father, just as if his mother had been an alien. At the present day by a senatusconsult passed on the proposition of the late Emperor Hadrian, even without civil marriage the offspring of a Roman woman and an alien is a lawful son of his father.”³

Marriage of Roman woman with Latin or peregrin.

In the second case, if a child is born of any union which is not *iustae nuptiae*, the rule is that he assumes his mother's nationality,—“partus ventrem sequitur.”⁴ “... When there is no capacity of civil marriage

As to issue of a union which is not *iustae nuptiae*.

¹ Gaius, i. 57: “Unde et veteranis quibusdam concedi solet principalibus constitutionibus connubium cum his Latinis peregrinisve, quas primas post missionem uxores duxerint; et qui ex eo matrimonio nascuntur, et cives Romani, et in potestate parentum fiunt.”

² *Corp. inscrip. Lat.* t. iii. no. 10; t. ix. nos. 261, 2995.—On military and kindred concessions in general, see Renier, *op. cit.* and Piccioni, *op. cit.*

³ i. 77: “Item si civis Romana peregrino cum quo ei connubium est, nupserit, peregrinus sane procreatur et is iustus patris filius est, tamquam si ex peregrina eum procreasset. hoc tamen tempore (ex) senatusconsulto quod auctore divo Hadriano factum est, etiamsi non fuerit connubium inter civem Romanam et peregrinum, qui nascitur, iustus patris filius est.”

between parents, their offspring follows the mother's status by the law of nations."¹ And Cicero says that if a woman, married to a man when there is no *connubium* between them, successfully sues for a divorce, the husband is not to retain the dowry for the children's maintenance, since they do not follow his condition.² Similarly, the *Digest* states that under these circumstances the issue belongs to the mother's condition by the 'law of nature,' unless there be a special legislative measure to the contrary.³

The same rule applies in the case of a child whose father is unknown, and also in that of certain other irregular unions,—“... qui patrem demonstrare non potest, vel ... habet quem habere non licet.”⁴

The principle
of *ius gentium*
—“partus
ventrem
sequitur.”

According to the general principle of the law of nations, viz. ‘partus ventrem sequitur,’ it would follow that the offspring of an irregular union of a Roman woman with an alien was a Roman citizen; but by the *lex Minicia* (of uncertain date) it was generally provided that where one parent was a non-citizen, the issue should also be of that condition.⁵ This *lex Minicia* appears to have applied in some cases—at least before Hadrian's senatusconsult—even where *connubium* existed between the parties; so that the son of a Roman woman and of a Latin belonging to the class of *Latini veteres* followed his father's condition. But the child of a Roman woman

¹ Gaius, i. 78: “... Ex eis inter quos non est *connubium*, qui nascitur iure gentium matris conditioni accedit.”—Similarly Ulpian v. 8: “Non interveniente *connubio* matris conditioni accedunt.”

² *Topic*. 4: “Si mulier, cum fuisset nupta cum eo quicum *connubium* non esset, nuntium remisit, quoniam qui nati sunt patrem non sequuntur.”

³ *Dig.* i. 5 (de statu hominum), 24: “Lex naturae haec est, ut qui nascitur sine legitimo matrimonio, matrem sequatur, nisi lex specialis aliud inducit.”

⁴ *Dig.* i. 5 (de statu hominum), 23.

⁵ Gaius, i. 78: “... Qua lege effectum est ut si matrimonium inter cives Romanos peregrinosque non interveniente *connubio* contrahatur is qui nascitur peregrini parentis conditionem sequatur.” (According to Krueger's restoration of the text.) Cf. Ulpian, v. 8.

and of a *Latinus coloniarius* or of a *Latinus Iunianus* was probably Roman at birth in conformity with the general rule. "C'est tout au moins ce qui ressort, croyons-nous, en dépit d'une lacune et de quelques obscurités, des §§ 79 et s. de Gaius."¹ These sections are to the following effect (though it is to be remembered they are given according to conjectural restorations of the text): ²"By the law of nations the offspring of a Latin woman by a Roman citizen with whom she has no capacity of civil marriage is a Latin, though statute, the *lex Minicia*, did not refer to those now termed Latins; for the Latins mentioned in the statute are Latins in another sense, Latins by race and members of a foreign State." "By the same principle, conversely, the son of a Latin and a Roman woman is by birth a Roman citizen, whether their marriage was contracted under the *lex Aelia Sentia* or otherwise. . . . However, the law on this point is now determined by the senatusconsult passed on the proposition of the late Emperor Hadrian, which enacts that the son of a Latin and a Roman woman is under every hypothesis a Roman citizen." "Consequently herewith Hadrian's senatusconsult provides that the offspring of the marriage of a Latin freedman with an alien woman, or of an

Hadrian's
amendment.

¹ Weiss, *op. cit.* vol. i. p. 35.

² Gaius, i. 79: "Adeo autem hoc ita est, ut ex cive Romano et Latina qui nascitur Latinus nascatur, quamquam ad eos qui hodie Latini appellantur, lex Minicia non pertinet; nam comprehendantur quidem peregrinorum appellatione in ea lege non solum exterae nationes et gentes, sed etiam qui Latini nominantur; sed ad alios Latinos pertinet, qui proprios populos propriasque civitates habebant et erant peregrinorum numero" (Mommsen's restoration in the earlier part of the section). i. 80: "Eadem ratione ex contrario ex Latino et cive Romana, sive ex lege Aelia Sentia sive aliter contractum fuerit matrimonium, civis Romanus nascitur . . . sed hoc iure utimur ex senatusconsulto, quo auctore divo Hadriano significatur, ut quoque modo ex Latino et cive Romana natus civis Romanus nascatur." i. 81: "His convenienter etiam illud senatusconsultum divo Hadriano auctore significavit, ut (qui) ex Latino et peregrina, item contra (qui) ex peregrino et Latina nascitur, is matris condicionem sequatur."

alien with a Latin freedwoman, follows his mother's condition."

Issue of union
of Roman
woman and a
slave.

A special case of the second category is where the child was issue of the cohabitation (*contubernium*) of a Roman woman and a slave. If the general rule 'partus sequitur ventrem' were allowed to operate, such offspring would thereby become a Roman citizen; but the *senatusconsultum Claudianum* provided that a Roman woman, cohabiting with another's slave, contrary to the wishes of his master, should be herself reduced to the servile condition; should she, however, obtain authorization, her liberty was preserved, but her children of such union became slaves.¹ Hadrian restored, in this connection, the application of the general rule, so that a child of a Roman woman and a slave acquired the nationality of the mother.²

Naturaliza-
tion in Rome.

As in Greece, citizenship was granted by Rome either to individuals, or to greater or lesser masses of individuals, or even to entire communities. The constitution of Caracalla marks the final stage of this extension of citizenship, a movement which synchronizes with the expansion of the Roman Empire.

Conquered
nations.

At first conquered peoples could become naturalized citizens on condition of their becoming permanently established on Roman territory, that is in the city or in its immediate vicinity. But with the increase of conquests and the subjugation of larger and larger bodies of people, this condition naturally became impossible to fulfil; so that towards the fourth century, after the dissolution of the Latin League in 338 B.C., their countries were constituted *municipia*, and citizenship was, in greater or lesser extent, bestowed on them.

Municipia.

It seems that the earliest *municipia* received full citizenship, 'civitas cum suffragio,' the political as well

¹ Paulus, *Sententiae*, ii. 21, §§ 1, 13, 17.—Cf. Tacit. *Ann.* xii. 53.

² Gaius, i. 82, 83, 84; cf. *Iust. Cod.* vii. 24; *Iust. Inst.* iii. 12. 1. For other less important provisions on this subject, see Gaius, i. 85, 86; and cf. Weiss, *op. cit.* vol. i. p. 37.

as the private privileges of the *ius civile*.¹ Later *municipia* were debarred from all the political privileges incidental to citizenship, and were thus reduced to a kind of passive citizenship—‘*civitas sine suffragio*’—so that communities of this nature were allowed to enjoy only a partial independence.² Among the first examples of this policy was Caere in Etruria.³ But by the sixth century the *municipia sine suffragio* had almost disappeared.

In 90 B.C. the *lex Iulia*⁴ granted citizenship to all the Latin allies who had remained faithful to Rome, provided they adopted the Roman jurisprudence;⁵ and in the following year a plebiscite, the *lex Papiria Plautia*,⁶ carried by Carbo and M. Plautius Silvanus, extended this concession to the people of the federate towns, including practically all the inhabitants of Italy. According to Cicero’s statement of this enactment, admission to *civitas* required the prior fulfilment of certain conditions, e.g. to be a citizen of an allied town, to be domiciled in Italy, and to make a declaration to the praetor, within sixty days, of the intention to acquire citizenship.⁸

In the later period of the Republic grants of citizenship became still more frequent. The privilege was given to the inhabitants of Gallia Transpadana, and to the Veneti⁷ (49 B.C.), to the people of Gades, of Sicily, and other countries. Sometimes it was capriciously given or sold to entire peoples,—“*data cunctis promiscue civitas romana*.”⁸

¹ Liv. vi. 26 ; viii. 14 ; Cic. *Pro Plancio*, 8.

² Cf. Weiss, *op. cit.* vol i. p. 286.

³ Aul. Gell. xvi. 13 : “*Primos autem municipes sine suffragii iure Caerites esse factos accipimus concessumque illis, ut civitatis Romanae honorem quidem caperent. . .*”

⁴ On the political situation of the Italian towns after the *lex Iulia*, see Marquardt, *op. cit.* vol. i. pp. 58 *seq.*

⁵ Cic. *Pro Balbo*, 8.

⁶ *Pro Archia*, 4 : “*Data est civitas Silvani lege et Carbonis : si qui foederatis civitatibus adscripti fuissent, si tum, cum lex ferebatur, in Italia domicilium habuissent et si sexaginta diebus apud praetorem essent professi.*”

⁷ Dion Cassius, xli. 36.

⁸ Aurel. Vict. *De Caesaribus*, 16.

Allies and
citizenship.
Lex Iulia.

*Lex Papiria
Plautia.*

Later period of
the Republic—
frequent
grants.

Lavish
bestowal of
Latinity in the
early Empire.

Similarly, the less comprehensive but important privileges of Latinity (*Latinitas*, or *Latium*) were lavishly bestowed on peoples in the early Empire, thus preparing the way for the conferring of full citizenship. Thus Tacitus reprovingly refers to the frequent grants made by Vitellius,—“*Latium vulgo dilargiri.*”¹ The same policy was pursued by Hadrian, who gave the right to numerous cities,—“*Latium multis civitatibus dedit,*”² and also by Vespasian, who extended the concession to the whole of Spain.³

Caracalla's
constitution.

Finally, the growth of Roman cosmopolitanism, the development of the imperial policy, the strivings to attain to harmony and stability of universal dominion, and, more especially, fiscal considerations rendered possible the extension of citizenship, by the constitution of Caracalla, to all the free subjects of the Roman Empire.⁴ As a French writer observes, it was the fiscal policy of Rome which facilitated the realization by a despot of a democratic ideal which had cost the lives of men like the two Gracchi and Drusus (whose intention it had been to give the Roman franchise to the Latins and the *Socii*). “*L'esprit fiscal était devenu le serviteur inconscient du progrès. Un despote avait réalisé paisiblement et avec plus d'étendue la pensée démocratique qui avait valu une mort violente aux deux Gracchus et au tribun Drusus.*”⁵

Roman
appreciation of
citizenship.

It must be noted, in view of the seemingly lavish and careless bestowal of these rights, that at no time did the Romans consider the gift of small consequence. Even during their most universalizing tendencies they carefully discriminated between the citizen and the non-citizen, between the individuals who had duly acquired citizenship, and those who had not done so, or those who

¹ *Hist.* iii. 55.

² Spartian, *Had.* 21.

³ Cf. Plin. *Hist. nat.* iii. 4.

⁴ *Dig.* i. 5, 17: “*In orbe Romano qui sunt ex constitutione imperatoris Antonini cives Romani effecti sunt.*”—Cf. Dion Cass. lxxvii. 9.

⁵ Accarias, *op. cit.* vol. i. p. 94.

had fraudulently exercised its rights. Thus Claudius¹ prohibited foreigners from adopting Roman names, especially the *nomina gentilicia*; and those who falsely pretended to be citizens of Rome he caused to be beheaded on the Esquiline.

Apart from slaves of thirty years' service on whom manumission in due and proper form conferred citizenship, the Latin peregrins could obtain it in various ways. (It has already been pointed out that when a Latinus receives citizenship he is usually described as obtaining the *ius Quiritium*,² and when it is conceded to a peregrin proper, the term generally employed is *civitas*.) Ulpian enumerates several methods:³ "Latins obtain Roman citizenship in the following ways: by grant of the emperor, by children, by iteration (or remanumission), by military service, by a ship, by a building, by the trade of baking; and, besides, in virtue of a senatusconsult, a woman obtains it by bearing three children." ("Latini ius Quiritium consequuntur his modis: beneficio principali, liberis, iteratione, militia, nave, aedificio, pistrino; praeterea ex senatusconsulto, mulier quae sit ter enixa.")

How Latin
peregrins
acquired
citizenship.

*Beneficio principali.*⁴ This method applied more to Latini coloniarii than to Latini Iuniani (that is, irregularly manumitted slaves, or those emancipated by a master deprived of quiritary property).

*Beneficio
principali.*

In the case of the Latini coloniarii succession devolved according to the civil law; but as to the Latini Iuniani, naturalized by imperial grant, citizenship became extinct with their death, so that their property went to their patrons, *iure peculii*, unless the latter had consented to their previous naturalization.

¹ Sueton. *Claud.* 25: "Peregrinae conditionis homines vetuit usurpare Romana nomina dumtaxat gentilicia. Civitatem Romanam usurpantes in campo Esquilino securi percussit."

² In Gaius, i. 32 b, for example, *civitas* is used in reference to Latins.

³ *Reg.* iii. 1.—Cf. Gaius, i. 28.

⁴ Ulpian, iii. 2.

"Sometimes a freedman," says Gaius,¹ "who has enjoyed the full citizenship dies in the condition of a Latinus Iunianus: as, for example, a Latinus Iunianus who has by imperial grant acquired citizenship, without prejudice to the rights of his patron. For, by a constitution of the Emperor Trajan, a Latinus Iunianus who receives the quiritary status by imperial grant without his patron's consent or knowledge, resembles during his lifetime other fully enfranchised freedmen, and begets legitimate children, but dies in the condition of a Latinus Iunianus, having no children who can inherit; and he has testamentary capacity only to the extent of instituting his patron heir, and naming a substitute to him in case of his renouncing the inheritance." "But as the effect of this constitution," he continues, "seemed to be that such a person could never die in possession of the full citizenship even though he subsequently acquired the title to which the *lex Aelia Sentia* or the *senatusconsult*² annexes the right of Roman citizenship, the Emperor Hadrian, to mitigate the harshness of the law, passed a *senatusconsult* that a freedman who received a grant of citizenship from the Emperor without the knowledge or consent of his patron, on subsequently acquiring the title to which the *lex Aelia Sentia* or the *senatusconsult*, if he had remained a Latinus Iunianus, would have annexed the rights of citizenship, should be deemed to have originally acquired citizenship, by the title of the *lex Aelia Sentia* or the *senatusconsult*."³

¹ iii. 72: "Aliquando tamen civis Romanus libertus tamquam Latinus moritur, velut si Latinus salvo iure patroni ab imperatore ius Quiritium consecutus fuerit. nam, ut divus Traianus constituit, si Latinus, invito vel ignorante patrono ius Quiritium ab imperatore consecutus sit [quibus casibus] dum vivit iste libertus, ceteris civibus Romanis libertis similis est et iustos liberos procreat, moritur autem Latini iure, nec ei liberi eius heredes esse possunt; et in hoc tantum habet testamenti factionem, ad patronum heredem instituat eique, si heres esse noluerit, alium substituere possit."

² The *senatusconsult* passed in the reign of Vespasian.—Cf. i. 31.

³ "Et quia hac constitutione videbatur effectum, ut ne umquam

Liberis. Junian Latins could obtain the status of *Liberis*. Romans by the procedure 'erroris causae probatio,' which Gaius¹ attributes to the *lex Aelia Sentia*, and Ulpian² to the *lex Iunia Norbana*. It was incumbent on the Junian Latin to prove that he had married—"uxorem liberorum quaerendorum causa ducere"—a woman whose status was either superior or equal to his own (that is, either a Roman woman or a Latin), and that of this marriage, executed in accordance with certain specified formalities, a child was born and had reached the age of one year (*anniculus*). In this way he acquired citizenship not only for himself, but also for his wife and children.

Iteratio, i.e. by remanumission, which, of course, also *Iteratio*. applied to the Junian Latins. Should there have been any defect inherent in the original manumission of a slave, it could be remedied by a second emancipation, either on the part of the quiritary owner, if the first manumission had held the slave only *in bonis* (i.e. in bonitary or natural ownership as distinguished from statutory, civil, or quiritary ownership), or effected by any of the solemn modes—*vindicta* (fictitious vindication), *censu* (registry by the censor), or *testamento* (testamentary disposition).³

By the following methods *every* Latin could obtain the franchise:—

Militia. In virtue of the *lex Visellia*, introduced by L. Visellius Varro in the time of Claudius, a Latin was awarded citizenship if he had served six years in

How all Latins could become citizens.

Militia.

isti homines tamquam cives Romani morerentur, quamvis eo iure postea usi essent, quo vel ex lege Aelia Sentia vel ex senatusconsulto cives Romani essent, divus Hadrianus iniquitate rei motus auctor fuit senatusconsulti faciendi, ut qui ignorante vel recusante patrono ab imperatore ius Quiritium consecuti essent, si eo iure postea usi essent, quo ex lege Aelia Sentia vel ex senatusconsulto, si Latini mansissent, civitatem Romanam consequerentur, proinde ipsi haberentur ac si lege Aelia Sentia vel senatusconsulto ad civitatem Romanam pervenissent."

¹ i. 29.

² Reg. iii. 3.

³ Cf. Gaius, i. 35 ; Ulpian, iii. 4.

the Roman guards ; later, this term was by a senatusconsult reduced to three years.¹

Nave. *Nave.* By an edict of the Emperor Claudius, a Latin having built a ship of the burden of at least 10,000 modii, and imported corn in it to Rome for six years, received Roman citizenship.²

Aedificio. *Aedificio*,—when a Latin possessed 20,000 sesterces, and devoted half to building a house in Rome or its suburbs.³

Pistrino. *Pistrino*—by building a mill and a bakehouse, and supplying Rome with their produce for three years.⁴

Mulier ter enixa. *Mulier ter enixa.* By a senatusconsultum, a Latin mother who had given birth to three children acquired the franchise.⁵

Magistratibus gestis. *Magistratibus gestis.* By the *lex Iulia*, Latins who had exercised magistracies in their own communities ('magistratibus in sua civitate gestis') acquired the rights of citizenship.⁶

How ordinary
peregrins
acquired
citizenship.

Not so well favoured as the Latins, peregrins proper could avail themselves of only two methods for the individual acquisition of the Roman franchise : firstly, by the procedure of 'erroris causae probatio,' and secondly, by an act of a properly constituted Roman authority.

¹ Ulpian, iii. 5: "Militia ius Quiritium accipit Latinus, (si) inter vigiles Romae sex annis militaverit, ex lege Visellia. Praeterea ex senatusconsulto concessum est ei ut, si triennio inter vigiles militaverit, ius Quiritium consequatur."—Cf. the statute, 13 Geo. II. c. 3, by which it was provided that every foreign seaman who in time of war had served for two years on board an English vessel, as well as all foreign protestants having served two years in a military capacity in the American colonies, were naturalized.

² Ulpian, iii. 6: "nave Latinus civitatem Romanam accipit, si non minorem quam decem milium modiorum navem fabricaverit, et Romam sex annis frumentum portaverit ex edicto divi Claudii."—Cf. the English law by which all foreign protestants who had been engaged for three years in whale-fishing were naturalized, except as to the capacity for holding public office.

³ Gaius, i. 33 ; Ulpian, iii. 1.

⁴ Gaius, i. 34 ; Ulpian, iii. 1.

⁵ Ulpian, iii. 1.

⁶ Gaius, i. 95.

Erroris causae probatio. This procedure dates from the *lex Aelia Sentia* (4 A.D.), according to Ulpian,¹ though Gaius² refers it to a later senatusconsult. When at the time of his marriage a Roman citizen was mistaken as to the nationality of his wife, whom he believed to be a citizen, when she was in reality a Latin or a peregrin proper, he could, by proving his mistake before a magistrate after the birth of a child, transfer his marriage ('iure gentium') into the civil 'iustae nuptiae,' and thus acquire citizenship for his wife and children.

This provision was not extended, however, to *peregrini dediticii*.

Act of Roman authority. At the time of the kings, the Roman people voted as to the admission of new citizens proposed by the king. After the reforms of Servius Tullius, the right which had before vested in the *comitia curiata* was transferred to the *comitia centuriata*.

Under the Republic similar principles were in force. Naturalization was granted on a vote by the people, in earlier times in the *comitia centuriata*, and later in the *comitia tributa*.³ It is uncertain whether the senate, under the Republic, shared with the people in the right to grant citizenship, or whether the censors could admit peregrins.⁴

On certain occasions, however, this power was delegated to magistrates, as, for example, to the triumvirs in the founding of colonies ('tresviri coloniae deducendae'), and also, at times, to the military commanders. Thus, Q. Fulvius Nobilior, founder of the colonies of Pisaurum and Potentia, inscribed in one of them (184 B.C.) in order to confer citizenship on him, the

¹ iii. 4.

² i. 67.

³ Cic. *Pro Balbo*, 24; Liv. viii. 17, 21; xxiii. 31; xxvii. 5; Velleius Paterculus, ii. 16.

⁴ Cf. Weiss, *op. cit.* vol i. pp. 290, 291, who denies it in each case.

poet Ennius, a native of Calabria.¹ On the motion of the tribune Appuleius Saturninus, the people passed a decree authorizing Marius to bestow citizenship on three individuals in each of the colonies which he was charged to establish (101 B.C.) after the war with the Cimbri.² A similar authorization, but of a more extensive character, was made to Pompey at the time of his command in Spain, to grant the franchise to a certain number of individuals. In this case, however, he was obliged to get the opinion of his council of war. "Nascitur, iudices, causa Corneli ex ea lege, quam L. Gellius Cn. Cornelius ex senatus sententia tulerunt : qua lege videmus satis esse sancti, ut cives Romani sint ii, quos Cn. Pompeius de consilii sententia singillatim civitate donaverit."³ It is very probable that Pompey obtained a like authority in the case of other countries besides Spain. Thus in Sicily where he was commander after Sulla's return from Asia, he bestowed the privilege on certain people, who thereupon assumed his family name (*nomen gentilicium*).⁴ Again, later when sent against Mithridates he conferred citizenship on the historian Theophanes of Lesbos. Cicero mentions other cases of generals who exercised the same functions, but these go back to the time of the Social War.⁵ When entire communities, and sometimes even provinces (as in the case of Gallia Transpadana), were awarded the franchise by a general, there is no doubt that such grant had to be subsequently ratified by an appropriate legislative measure ;—of which an example is seen in the case of the people of Gades.⁶

Under the
Empire.

Under the Empire, the will of the emperors was all-powerful in this as in other respects. They became practically the sole legislative organ. By virtue of the

¹ Cic. *Brut.* 20, 79.

² Cic. *Pro Balbo*, 20, 21 : "... qua lege Saturninus C. Mario tulerat, ut in singulas colonias ternos cives Romanos facere posset..."—Cf. Plut. *Mar.* 28.

³ Cic. *Pro Balbo*, 8.

⁴ Cic. *In Verr.* ii. 8, 42 ; iv. 11, 22.

⁵ *Pro Balbo*, 22 ; cf. *Pro Archia*, 10.

⁶ Dion Cass. xli. 24.

'beneficium principale' (referred to above), they could grant citizenship either to individuals or to entire cities, except, however, to *dediticii liberti*.¹

From time to time additional methods were adopted for securing the admission of peregrins. Thus by a disposition of the *lex Acilia repetundarum*² (123-2 B.C.) citizenship was awarded to a peregrin, through whose instrumentality a conviction was obtained of a magistrate accused of peculation. In like manner it was granted to Latins by the later *lex Servilia* (111 B.C.).

Further means
of admitting to
the franchise.

Women, equally with men, could in certain cases receive citizenship, apart from marriage relationships. Cicero mentions a law, carried on the proposition of the *praetor urbanus*, conferring citizenship on a woman, who came from the allied Greek town of Velia, in the south of Italy, in order to permit her to become priestess of Ceres.³

Grants to
women.

Emancipated *dediticii* (that is, those who had been slaves and had taken up arms against Rome, and had been defeated and surrendered⁴) were entirely debarred from the privilege of Roman citizenship, as well as from Latinity,—“nunquam aut cives Romanos aut Latinos fieri dicemus. . . .”⁵

Emancipated
dediticii
debarred.

Certain classes of foreigners were sometimes subject to special regulations. Thus, the Gauls were admitted to citizenship on the condition (apart from the other necessary qualifications) that they renounced their national religion,—the druidical worship; and the

Special rules as
to certain
aliens.

¹ See *supra*, p. 232, and *infra*, chap. xxiv. *ad fin.*

² As to the *lex Acilia*, cf. Girard, *Textes de droit romain* (Paris, 1890), pp. 40, 41.

³ *Pro Balbo*, 24: “. . . proxime dico ante civitatem Veliensibus datam de senatus sententia C. Valerium Flaccum praetorem urbanum nominatim ad populum de Calliphana Veliense, ut ea civis Romana esset, tulisse.”—Cf. Orelli, *op. cit.* no. 3038: “Valeria C. L. Lycisca || XII. annorum nata || Romam veni || quae mihi iura dedit civis. dedit et || mihi vivae . quo inferer . tum || cum parvola facta ceinis.”

⁴ Cf. Gaius, i. 14, 15, 16.

⁵ Gaius, i. 15.—Cf. Ulpian, i. 14.

Egyptians, only after previously being enrolled citizens of Alexandria.¹

Records.

The acts of naturalization were usually engraved on bronze tablets, and set up in the public place and sometimes in temples (as the Greeks did). Livy relates that after the defeat at Trisenum (B.C. 340) of a tumultuary army by the consul Torquatus, and the surrender of Latins and Campanians, the Campanian horsemen were exempted from punishment, because they had not revolted, and the rights of citizenship were granted to them; and as a memorial, a brazen tablet was hung up in the temple of Castor at Rome.²

Effect of
naturalization.

Full
citizenship.

The naturalized alien was placed, with regard to both private and public rights, practically on the same footing as natural-born citizens. He was capable of the same regular marriage (*iustae nuptiae*) as that of the Romans, of quiritary ownership (*dominium ex iure Quiritium*), the right to vote in the comitia (*ius suffragii*), the right to institute public actions before the assembly of the people, the right to occupy the various magistracies, with the probable exception, in earlier times, of the position of senators. In later times, naturalized foreigners were, it appears, even admitted to the dignity of senators. Thus, Tacitus reports a speech of Claudius in the senate, on the admission of foreigners to citizenship, to this effect: "Without searching the records of antiquity, we know that the nobles of Etruria, of Lucania, and, in short, of all Italy, have been incorporated into the senate."³ And, again, speaking of the degeneration of Rome in the year 22 A.D., Tacitus

¹ Plin. *Epist.* x. 6: "Sed cum annos eius et censum, sicut praeceperas, ederem, admonitus sum a peritoribus debuisse me ante ei Alexandrinam civitatem impetrare, deinde Romanam, quoniam esset Aegyptius."

² Liv. viii. 11: "Equitibus Campanis civitas Romana data, monumentoque ut esset, aeneam tabulam in aede Castoris Romae fixerunt."

³ *Ann.* xi. 24: "Et ne vetera scrutemur, Etruria Lucaniaque et omni Italia in senatum accitos."

observes : " At the same time a new race of men from the municipal towns, the colonies, and the provinces found their way not only into Rome, but even into the senate." ¹

Even those who had obtained citizenship without the political privileges (*civitas sine suffragio*) shared many important civil rights (apart from the positive rights included in their grant), such as the right to appeal to the assembly of the people from the decisions of magistrates (*ius provocacionis*), the power of escaping from penalties inflicted upon them by voluntary exile (*ius exsilii*), and they also received the protection of the *lex Porcia*, which enacted that a Roman citizen must not be beaten to death, and that of the *lex Sempronia* (123 B.C.), which provided that no attempt should be made on the life of a citizen without the permission of the people.

Citizenship
without
political rights.

As a general rule, the grant of the franchise was an exclusively personal privilege, operating only in favour of the individual designated in the act. To extend the privilege to his wife and children, it was necessary to insert a special clause to that effect. Such clauses, however, are frequently found in extant documents relating to naturalization,² and especially so in certificates conferring citizenship on peregrin soldiers at the expiration of their term of service.³

The grant
generally
personal.

The present chapter has shown that certain important elements of private international law were clearly recognized by Rome, and that these elements, moreover, furnished the fundamental basis of the law and practice of modern States with regard to questions of domicile, nationality, and naturalization. We have seen that the

¹ *Ann.* iii. 55 : " Simul novi homines e municipiis et coloniis atque etiam provinciis in senatum crebro adsumpti."

² Cf. *Plin. Epist.* x. 6 (C. Plinius Traiano Imperatori) : " Ago gratias, domine, quod et ius Quiritium libertis, necessariae mihi feminae et civitatem Romanam Harpocrati, iatraliptae meo, sine mora indulsisti."

³ Cf. *Orelli, op. cit.* vol. i. no. 2652 ; *Renier, op. cit.* no. 9 (a

Romans carefully discriminated between the *ius originis* and the *ius domicilii*,—matters which were in and for our own age developed with such fruitful results by the great jurist Savigny. We have seen the extent of our indebtedness to the Roman conception of *factum* and *animus* in the acquisition of domicile; to the treatment of plurality of domiciles; and to the regulation of the domicile of a husband's wife and children. We have seen the gradual development of rules relating to the nationality of origin, in conformity with the demands of the *ius gentium*; and the establishment of a systematized practice as to concessions of citizenship, and the formalities and public authorization necessary thereto.

portion of the first outside page of such a certificate found at Gragnano in 1750, and now at the Naples Museum):

“Ti. Claudius Caesar Aug(ustus) Germanicus,
pontifex maxim(us), trib(unicia) pot(estate) XII, imp(erator) XXVII,
pater patriae, censor, co(n)s(ul) V,

Trierarchis et remigibus, qui militave-

runt in classe, quae est Miseni sub Ti.

Iulio, Aug(usti) lib(erto), optato, et sunt dimissi

honestâ missione, quorum nomina sub-

scripta sunt, ipsis, liberis posterisque

eorum civitatem dedit, et connubium

cum uxoribus, quas tunc habuissent

cum est civitas iis data, aut, si qui

caelibes essent, cum iis quas postea

duxissent, dum taxat singuli singulas, . . .”

. . . etc.

CHAPTER XII

ROME AND FOREIGNERS.—JURISDICTION.—PERSONAL AND TERRITORIAL LAW.—CONFLICTS OF LAWS

THE development and the applicability in general of the *ius gentium* and the legal position of the different classes of peregrins have already been considered. It has been pointed out that in the earlier epochs of ancient States the attitude to foreigners was marked by severity, that a more or less rigid exclusiveness then usually obtained, that the ever-increasing intercourse and communication, in warlike as well as in peaceful relationships, tended to promote the adoption of various relaxations, that the institutions of *hospitium* and *clientela* were made possible, and soon exerted a profound influence on the conceptions and ideals of international conduct, so that a universal desire was fostered for entering into formal treaties of peace, of alliance, of commerce; it has been pointed out that the institution of *recuperatores*¹ was established to examine the disputes in which foreigners were involved, and thus finally in the *praetor peregrinus* (somewhat like the *xenodikai* in Greece), a more permanent and more comprehensive and efficacious jurisdiction was set up to meet the growing demands of all classes of peregrins.

It appears, as Becker has pointed out, that the shorter title, *praetor peregrinus*, is first found in inscriptions of the time of Trajan (98-117 A.D.). In the older laws

Gradual
relaxations in
policy as to
aliens.

The title
'praetor
peregrinus.'

¹ On *recuperatores*, see *infra*, chap. xvii, *ad fin.*

the alien praetor is more fully designated 'praetor qui inter peregrinos (as also inter cives et peregrinos) ius dicit,' and the urban praetor is likewise described as 'praetor qui inter cives ius dicit.'

Origin of
praetor
peregrinus.

The date of the origin of the *praetor peregrinus*¹ is not certain; but it would seem from a passage in Lydus² that the office was first instituted in 247 B.C. In the view of Niebuhr, this came about merely through reasons of political necessity, the main cause being the desire to destroy or mitigate the excessive power of many Roman citizens of aristocratic stock, who had become the patrons of large numbers of foreign clients. But the explanation given by Pomponius is more probably correct, viz. the inadequacy of the urban praetor to cope with the necessities of the constantly increasing multitude of foreigners, which, consequently, brought about the appointment of a special official for that purpose. "... Non sufficiente eo praetore quod multa turba etiam peregrinorum in civitatem veniret, creatus est et alius praetor qui peregrinus appellatus est ab eo, quod plerumque inter peregrinos ius dicebat."³

Appointment
and position of
peregrin
praetor.

Like the *praetor urbanus*, whose province became practically confined to affairs between citizens, the *praetor peregrinus* was nominated every year by the *comitia centuriata*, on the day following the election of the consuls. Later, at the time of the 'sortitio provinciarum,' he was elected by lot, and his department and jurisdiction were specially assigned.⁴ He enjoyed the same rank as the urban praetor, save that the latter had the prior right to discharge the functions of consuls

¹ On the *praetor peregrinus* and his influence on the development of the *ius gentium*, see F. C. Conradi, *De praetore peregrino*; Rodière, *loc. cit.*; C. de Boeck, *Le préteur pérégrin* (Paris, 1882); F. Faure, *Essai historique sur le préteur romain* (Paris, 1878), pp. 92 seq.

² *De magistratibus populi romani libri tres*.

³ *Dig.* i. 2. 2. 28.

⁴ *Liv.* xxii. 35; xxiii. 30; xxxii. 28.—Cf. Mommsen, *Röm. Staatsr.* vol. ii. pt. i. pp. 208 seq.

in their absence,¹ and also could alone celebrate certain games and sacrifices.

We find the *praetor peregrinus* from time to time performing various other duties. Thus the command of Roman legions was occasionally entrusted to him;² and, as Livy tells us, he was sometimes engaged in the raising of troops,³ in the equipping of ships,⁴ in the quelling of servile insurrections.⁵ At times he acted as master of the mint, as superintendent of the distributions of corn (*frumentationes*), and as guardian of the temples and public monuments.⁶ Again, he was, on certain occasions, charged with diplomatic missions or other functions of a like character. For example, in 181 B.C., he introduced to the senate deputies from transalpine Gaul;⁷ in 172 B.C. he took charge of the installation of the son of the king of Cappadocia, Ariarathes, and of his suite;⁸ in 179 B.C. he conveyed to the Ligurians the ambiguous pronouncement of the senate in reply to their request for perpetual peace;⁹ he was sent to Numidia to bring Jugurtha back to Rome.¹⁰ And, arising out of such duties, a certain international judicial function was now and again exercised by him, as when he investigated the complaints made against the Illyrians of acts of brigandage,¹¹ and decided as to the expulsion of foreigners whose presence was deemed to be detrimental to public safety.¹² On

Other duties
performed by
him.

¹ Cf. Girard, *Histoire de l'organisation judiciaire des Romains* (Paris, 1901), t. i. p. 210, n. 3.

² Liv. xxi. 26. 43; xxvii. 7; xxviii. 10.

³ Liv. xl. 18; xlii. 27; xliii. 9.

⁴ Liv. xxvii. 22; xlii. 27.

⁵ Liv. xxxiii. 26. ⁶ Cic. *In Verrem*, ii. 1. 50. ⁷ Liv. xxxix. 54.

⁸ Liv. xlii. 19. ⁹ Liv. xl. 18. ¹⁰ Sall. *Iug.* 32. ¹¹ Liv. xl. 37 seq.

¹² Liv. xxxix. 3.—Cf. Aul. Gell. vii. 19; xv. 11: "Neque illis solum temporibus nimis rudibus necdum Graeca disciplina expolitibus philosophi ex urbe Roma pulsi sunt, verum etiam Domitiano imperante senatusconsulto eiectioni atque urbe et Italia interdicti sunt. Qua tempestate Epictetus quoque philosophus propter id senatusconsultum Nicopolim Roma decessit."—Val. Max. i. 3: "Chaldaeos igitur Cornelius Hispanus urbe expulit et intra decem dies Italia abire iussit, ne peregrinam scientiam venditarent."

one occasion (187 B.C.) twelve thousand Latins were compelled to leave Rome, as a result of his decision : "Hac conquisitione duodecim milia Latinorum domos redierunt, iam tum multitudine alienigenarum urbem onerante."¹

Competence
of the two
praetors.

The jurisdictions of the two praetors were never clearly determined, at least till the time of the emperors, and scarcely ever sharply discriminated. The competence of the *praetor peregrinus* extended to ordinary peregrins, as well as to Latins or *municipes* when in Rome. When the Latin peregrins remained in their own towns they were amenable to their local tribunals, or to the *praefecti iure dicundo* appointed by the *praetor urbanus* to administer civil justice in a certain number of towns.²

Proceedings
before the
peregrin
praetor.

It was possible to proceed before the *praetor peregrinus* by the *sacramentum* (which was at first an actual stake or deposit liable to forfeiture, afterwards security offered by the litigants). Thus Gaius in his section on fictions says that only two cases were set apart for statute process, namely, apprehended damage and centumviral causes, and adds that the latter were still preceded by the statute process of *sacramentum* before the urban praetor or the peregrin praetor, as the case may be. "Tantum ex duabus causis permissum est lege agere ; damni infecti et si centumvirale iudicium futurum est. sane quidem cum ad centumviros itur, ante lege agitur sacramento apud praetorem urbanum vel peregrinum (praetorem)."³ On this passage mainly Mommsen bases his conclusion that peregrins had the right to resort to the *legis actiones* in general : "Sacramento actum esse etiam apud praetorem peregrinum, id est lege agere potuisse peregrinos quoque confirmat Gaius."⁴ It is questionable, however, whether the

¹ Liv. xxxix. 3.

² Cf. Mommsen, *Röm. Staatsr.* vol. ii. p. 218.

³ Gaius, iv. 31 (certain minor restorations of text have been made in this passage).

⁴ In his commentary on *Corp. inscrip. Lat.* vol. i. p. 66, no. 23.

sources referred to warrant the drawing of a generalization to this extent.

Usually the *praetor peregrinus* referred the litigants Recuperators. to the recuperators, who have been described as the successors of the international judges of early Rome,—“héritiers des juges internationaux de la Rome primitive.”¹

He applied the provisions of the *ius gentium*; and by means of his edicts gradually expanded this ‘gentile’ The praetor and the *ius gentium*. law till it attained to a fully-developed system, which, constantly enlarging its applicability and furnishing equitable solutions ultimately assumed a predominating position. As a French writer observes, in reference to the growth of the *ius gentium* and its final triumph over and absorption of the civil law, it was at first “étranger aux rapports des citoyens entre eux, puis devenu le droit commun à tous les hommes libres qui ont accès aux tribunaux romains, envahit le domaine originairement régi par le jus civile, engage avec lui un combat victorieux, le supplante et l’absorbe, et constitue, sous le nom de jus romanum ce droit, à la fois humain et universel, qui a traversé les siècles.”²

But under the emperors, with their subtle and rigorous invasions into established institutions, with their all-transforming policy, the importance of the *praetor peregrinus* began to decline, and his judicial competence became more and more diminished. His office was subordinated to that of the *praefectus urbi*, instituted by Augustus; and by the time of the Antonine constitution with its universalized franchise, it has practically sunk into insignificance; so that what was formerly a magistracy of great power had (to use an expression of Boethius) declined to an empty name,—“atque praefectura magna olim potestas, nunc inane nomen. . . .”³

In the application of the peregrin law in the classical

¹ Weiss, *op. cit.* vol. v. p. 29.

² C. de Boeck, *op. cit.* p. 210.

³ *De consolatione*, iii. 4.

Application of
peregrin law—
different
systems.

period before Caracalla's extension of the Roman franchise, different rules and systems were more or less involved. And in considering their application it is important to bear in mind that not only were peregrins proper subjected to this régime, but also people who were in alliance with Rome—*liberi et foederati*—and preserved their autonomy, and who therefore were, in regard to the Romans, aliens (*externi*). As Proculus says in the *Digest*: "non dubito quin foederati et liberi nobis externi sint."¹ Again, sometimes communities without being strictly *liberi* were permitted, in virtue of a formal concession by the *lex provinciae*, to retain their private law. By a senatusconsultum promulgated in 196 B.C. on the conclusion of the Macedonian war, this was the position of the Corinthians, the Phocaeans, the Locrians, the Euboeans, the Magnetes, the Thesalians, the Perrhaebi, and the Achaeans of the Phthiotis,² a district in the south-east of Thessaly. From about the same date also the Chalcidians,³ somewhat later (167 B.C.) the Macedonians,⁴ in the time of Cicero Byzantium, Mytilene, Smyrna, Dyrrhachium (in Greek Illyria), Patrae (in Achaea), Thermae, and most of the Sicilian towns, under Trajan Amisus (on the coast of Pontus), and many other cities besides enjoyed their own laws, which were either their original laws, or such as had been conferred upon them by the Roman generals who had secured their submission.⁵ As to the Gauls, amongst the *civitates foederatae* were the Carnuti, the Aedui, the Remi, the Lingones, the Vocontii; and amongst the *civitates liberae* were the Santones, the Turones, the Bituriges Cubi and Bituriges Vivisci (or

¹ *Dig.* xlix. 15, *pr.*

² *Liv.* xxxiii. 32.

³ *Liv.* xxxv. 46.

⁴ *Liv.* xlv. 29: "omnium primum liberos esse iubere Macedonas, habentes urbes easdem agrosque, utentes legibus suis, annuos creantes magistratus."

⁵ For a full account of this organization, see Marquardt, *Organisation des römischen Reichs* (in *Römische Staatsverwaltung*).

Ubisci), the Arverni, the Viducassi, etc.¹ And to these must be added the numerous cities which received the *ius latii*, thus forming a privileged class amongst foreign cities. The Roman colonies are to be excepted from this category, as the Roman law was almost entirely applied to them.²

It will be evident from these considerations that there were bound to be different systems and rules in force amongst the aliens in their respective countries. Under the circumstances, the contrary is scarcely conceivable. In many of the departments of private law there were differences, greater or lesser, between the Roman law and peregrin law,³ and also between the various systems of peregrin law themselves. Thus in the Italian towns special rules prevailed in regard to marriage; but these were, of course, abandoned when Roman citizenship was conferred on them.⁴ Paternal authority was nowhere organized exactly as the *patria potestas* was in Rome; nor was dominical power. In some communities, tutelage of minors could not be determined by testamentary disposition. Tutelage of women, in the strict sense, was generally unknown; at most a quasi-tutelage obtained. There were differences in the methods of adoption and succession. Conceptions of property and possession varied considerably. The Roman distinction between *dominium* and *in bonis* was hardly anywhere adopted.⁵ The provisions relating to wills varied from place to place.⁶ There were differences in contracts, in the conception of their binding force, in the obligations imposed by them. Some contractual obligations were enforced in peregrin countries, and not admitted in Rome. And so on with other differences in the several branches of private jurisprudence.

Peregrin law
and Roman
law—
divergence.

¹ For more detailed information, see Klipffel, *Étude sur le régime municipal gallo-romain* (in *Nouvelle Revue historique de droit français et étranger*, Paris, 1878 and 1879, pp. 283 seq.).

² Cf. Chénon, *loc. cit.* p. 216.

³ Cf. Chénon, *op. cit.* p. 217.

⁴ Aul. Gell. iv. 4.

⁵ Gaius, ii. 40.

⁶ Ulpian, xx. 4.

Law applied
to peregrins
resident in
Rome.

The important question arises, in view of the multiplicity of such variations and inconsistencies, what law is applied to the peregrins when residing temporarily or permanently in Rome? The rights refused to aliens in Rome by the *ius civile*, and those conferred on them by the *ius gentium* have already been mentioned.¹ The principles of the *ius gentium* as administered by the *praetor peregrinus* were deemed to be applicable to peregrins in general, either in disputes amongst themselves or between themselves and Roman citizens; so that in regard to those matters covered by this special system there could scarcely arise conflicts of laws. But Laurent goes too far when he says in his usual manner of rapid generalization: "Les Romains, pas plus que les Grecs, n'avaient aucune idée d'un droit personnel. . . . Quant au droit des gens, c'était un droit commun à toutes les nations, le même partout. Cela rendait tout conflit impossible entre les deux droits, car le droit des gens faisait partie du droit civil."² But by his admission, made at the same time, that conflicts were possible between peregrins belonging to different communities, he undermines the very basis of his theory.

Peregrin law
in Rome.

Now peregrins when in Rome enjoyed many private rights which, though exercised in a somewhat different manner, yet possessed the same substantial significance as the corresponding rights of the Roman civil law, and the same validity in respect of their legal sanction. So that in conformity with certain determined laws, aliens were enabled to contract marriages, to exercise paternal and dominical authority, to avail themselves of the rights of adoption, tutelage, of testamentary rights, intestate succession, and so forth. "En un mot, ils avaient eux aussi, leur jus civile pérégrin, correspondant au jus civile romain."³ As Gaius says in a passage where, however, a wider application is intended, the different people were governed partly by their own

¹ See *supra*, pp. 233 *seq.*

² *Le droit civil international*, vol. i. §§ 102, 104.

³ Chénou, *loc. cit.* p. 225.

particular laws, partly by those common to all men : "Omnes populi, qui legibus et moribus reguntur, partim suo proprio, partim communi omnium hominum iure utuntur."¹ And Justinian repeating the statement adds, in order to be more explicit, that civil law derives its name from the State where it prevails, as, for example, the civil law of Athens, it being quite correct thus to designate Solon's or Draco's legislation.²

We therefore get a peregrin civil law existing side by side with the Roman civil law. The two systems could regulate common institutions ; and, if it may be so expressed, the totality of their points of coincidence represents the sphere of the *ius gentium*. But as there was not, and under the circumstances there could not possibly have been, a perfect analogy between the two systems and corresponding provisions relating to all departments of civic and private life, a conflict of legislations would necessarily occur when there arose such a dispute, as to matters recognized in the Roman civil law only, or exclusively in the peregrin civil law, that the existing *ius gentium* was incapable of application. Thus we find in Rome questions of the nature of private international law,³ and deliberate attempts to provide a solution to the difficulties involved.

Possible conflicts between the peregrin law and the Roman.

In some cases conflicts were obviated by special provisions in anticipation of the possibility of such difficulties arising, as, for example, when a treaty of alliance was entered into with Rome, or when the *lex data* was imposed by the Roman conqueror ; so that in some cases more or less of the native law of the peoples concerned was swept away, in other cases it was less elaborately modified or supplemented by dispositions of the Roman jurisprudence. Occasionally provincial

How conflicts of laws were obviated.

¹ *Dig. i. 1. 9.*

² *Inst. i. 2. 2* : "Sed ius quidem civile ex unaquaque civitate appellatur, veluti Atheniensium ; nam si quis velit Solonis vel Draconis leges appellare ius civile Atheniensium, non erraverit."

³ Cf. Chénon, *loc. cit.* p. 225.

governors were authorized to dispense with the peregrin civil law that prevailed in their districts, and regulate certain matters by means of special edicts intended to apply to everybody. In this way new regulations were laid down respecting the constitution of States, debts, usury, contracts, and various other matters, as Cicero mentions in one of his letters: ¹ "... Edicto Asiatico, extra quam si ita negotium gestum est, ut eo stari non oporteat ex fide bona, multaue sum secutus Scaevolae, in iis illud, in quo sibi libertatem censent Graeci datam, ut Graeci inter se disceptent suis legibus. Breve autem edictum est propter hanc meam διαίρεσιν quod de duobus generibus edicendum putavi, quorum unum est provinciale, in quo est de rationibus civitatum, de aere alieno, de usura, de syngraphis, in eodem omnia de publicanis. ..." Again, Cicero relates, with regard to the Sicilian towns, for instance, that if a dispute arose between two citizens of the same town, it was tried according to their common laws; but if it were between citizens of different towns, the praetor appointed judges by lot, in virtue of the decree of P. Rupilius, viz. the *lex Rupilia*. And should there be any difference between a private individual and an entire community, the senate of a third city was to be chosen as judges or arbitrators, in case the senates of the towns in question are objected to. In any action by a Roman citizen against a Sicilian, the judge was to be a Sicilian; if the action is brought by a Sicilian against a Roman, the judge was to be a Roman; in other matters the judges were to be selected from among the Roman citizens ("Siculi hoc iure sunt, ut, quod civis cum cive agat, domi certet suis legibus; quod Siculus cum Siculo non eiusdem civitatis, ut de eo praetor iudices ex P. Rupilii decreto, quod is de decem legatorum sententia statuit, quam legem illi Rupiliam vocant, sortiatur. Quod privatus a populo petit, aut populus a privato, senatus ex aliqua civitate, qui iudicet, datur, quum alternae civitates reiectae sunt. Quod civis Romanus a Siculo petit, Siculus iudex datur;

¹ *Ad Attic.* vi. 1. 15.

quod Siculus a cive Romano, civis Romanus datur ; ceterarum rerum selecti iudices civium Romanorum ex conventu proponi solent" ¹). These provisions, based largely on equitable considerations, were (Cicero adds) overthrown under the praetorship of Verres.

Again, in the case of aliens in Rome, the *ius gentium*, The *ius gentium* supplemented by the *lex peregrinorum*. where found inadequate or inoperative, was frequently supplemented or replaced by the *lex peregrinorum*, the law of origin (*ius originis*) of the peregrins in question. This concession to foreigners was due to the desire on the part of the Romans to grant them justice and equitable treatment, as well as to political reasons. It was often bestowed on people who were subjugated and brought under the Roman dominion. The work of assimilation proceeded the more easily and thoroughly when such measures of tolerance were adopted, and respect for the national customs of the conquered were shown. Thus Cicero writes : "... Ita multae civitates omni aere alieno liberatae, multae valde levatae sunt ; omnes suis legibus et iudiciis usae *αὐτονομίαν* adeptae, revixerunt" ; ² and again as to the Greeks retaining their own judges—"Graeci vero exsultant, quod peregrinis iudicibus utuntur." ³ Pliny refers to the city of Amisus as being allowed to enjoy its own judicial system : "Amisinorum civitas et libera et foederata... suis legibus utitur" ; ⁴ and Livy enumerates many communities ⁵ (already mentioned above) treated on the same footing. This policy explains the active coexistence within the Empire of Roman law and divers peregrin bodies of law, ⁶ and their application in accordance with the varying needs and changing conditions.

¹ *In Verrem*, ii. 2. 13.

² *Ad Att.* vi. 2. 4.

³ *Ibid.* vi. 1. 15.

⁴ *Epist.* x. 93.

⁵ xxxiii. 32 : "... Senatus Romanus et T. Quinctius imperator Philippo rege Macedonibusque devictis liberos, immunes, suis legibus esse iubet Corinthios Phocenses Locrensesque omnis et insulam Euboeam et Magnetas, Thessalos, Perrhaebos, Achaeos Phthiotas."

⁶ Cf. L. von Bar, *Theorie und Praxis des internationalen Privatrechts*, 2 Bde. (Hannover, 1889-1890), vol. ii. p. 20.

When an individual belonged to different communities by origin and domicile.

It has already been explained that an individual could be attached to a town by a twofold tie,—*origo* and *domicilium*. To belong to a town involved in general his being subject to certain *munera*, to the local jurisdiction, and to its positive law. But in case a person belonged to several towns, in virtue of *origo* or *domicilium*, he was liable to the *munera* and jurisdiction of each ; but he could not, of course, be subject at one and the same time to the legislations of the different communities. As a rule, the defendant could be made to appear before different magistrates at the election of the plaintiff. But when brought before this or that tribunal the question arises, in view of the coexistence of two or more systems of law, what particular body of rules is to be resorted to ; for the *ius originis* and the *lex domicilii* may provide different or even contrary solutions to the particular matters in litigation. To meet such a contingency, the territorial law adopted to adjust differences of this character was determined by the law of origin and not by the domicile. Thus Savigny held it as an indisputable fact that when an individual possessed citizenship and a domicile in different towns, the law of his own city governed the application of the local law. “Ich halte es nun für unzweifelhaft dass das örtliche Recht, dem jede Person unterworfen seyn sollte, wenn diese Person in zwei verschiedenen Städten das Bürgerrecht und den Wohnsitz hatte, durch das Bürgerrecht bestimmt wurde, nicht durch den Wohnsitz.”¹ The reason for this is, as the same eminent writer points out, that *origo* is an older, earlier tie, originating with the birth of the person, as well as a stricter and superior one, since domicile is necessarily subject to his arbitrary will and varying caprice. “Erstlich war das Bürgerrecht das engere, an sich höher stehende Band, verglichen mit dem von Willkür und Laune abhängenden Wohnsitz. Zweitens war es das frühere Band, da es durch die Geburt geknüpft

Savigny's view as to application of the law of origin.

¹ *System des heut. rom. Rechts*, vol. viii. § 357, p. 87.

wurde, der anderwärts vorhandene Wohnsitz erst später durch eine freie Handlung entstanden sein konnte, weshalb das für die Person einmal begründete territoriale Recht hätte umgewandelt werden sollen."¹ There are several texts that confirm this view. Thus we find in Gaius "... et alio iure civitas eius utatur," where he speaks of no successor of the sponsor or fidepromissor being bound, except the successor of an alien fidepromissor in whose municipality such a rule prevails;² in Ulpian "... ut secundum leges civitatis suae testetur,"³ where he refers to the validity of wills when made in conformity with the laws of the city; in Justinian's *Code*, we find the rescript of Diocletian pointing out the applicability of the provisions of the municipal constitution to the execution of testaments—"si non speciali privilegio patriae tuae iuris observatio relaxata est et testes non in conspectu testatoris testimoniorum officio functi sunt, nullo iure testamentum valet."⁴

If this rule be admitted to be true, certain cases, as Savigny observes, present themselves which do not appear to be covered by it. When an individual enjoyed citizenship in several towns at the same time, e.g. in one by virtue of his birth, in another by adoption or admission, his oldest citizenship, that is, the one resulting from *origo*, was regarded as pre-eminent ("In einem solchen Falle wurde ohne Zweifel das frühere Bürgerrecht, also das durch Geburt entstandene (die *origo*) als vorherrschend behandelt . . ."⁵). Again, if an individual had no citizenship at all in any town, and possessed only a domicile in some country, then his *ius domicilii* was the determining factor ("Zweitens konnte Jemand ganz ohne städtisches Bürgerrecht sein, während er einen Wohnsitz hatte. In diesem Fall

Exceptional cases in such application. Where plurality of citizenship exists.

Where there is no citizenship.

¹ *Ibid.*

² iii. 120: "... Sponsoris et fidepromissoris heres non tenetur nisi si de peregrino fidepromissore quaeramus, et alio iure civitas eius utatur."

³ xx. 15.—Cf. *infra*, p. 292, note 3.

⁴ *Cod. Just.* vi. 23. 9.

⁵ *Op. cit.* § 357, p. 88.

musste der Wohnsitz als Bestimmungsgrund für das auf ihn anwendbare persönliche Recht gelten"¹). Further, as to an individual possessing no citizenship at all, but having a domicile either in several towns or in none at all, we have no direct evidence as to how the Romans treated such a case ("Wie die Römer solche, bei ihnen gewiss seltene Fälle beurtheilt haben mögen, lässt sich aus unsern Rechtsquellen nicht durch unmittelbare Zeugnisse nachweisen"²).

Applicability
of personal law
to peregrins of
same *origo*.

This personal or national law³ was mainly applicable to those peregrins invested with the same *origo*; it could scarcely be operative in the case of those of different nationality, and in the relationships between Roman citizens and peregrins. Further, as Girard points out,⁴ it had no validity in the case of such *dediticii* as were exempted from the local juridical system,—which was of rare occurrence under the Empire, the only instance being that of the Jews, after the taking of Jerusalem,⁵—nor in the case of those who were condemned to deportation at the time of the Emperors.⁶

¹ Savigny, *op. cit.* § 357, p. 88.

² *Ibid.*

³ On the relationships of the various systems of national law to the Roman civil law under the Empire, cf. L. Mitteis, *Reichsrecht und Volksrecht in den östlichen Provinzen des römischen Kaiserreichs* (Leipzig, 1891).

⁴ *Manuel élém. de dr. rom.* p. 111: "Elle était surtout relative aux rapports des pérégrins de même cité ou tout au moins de même nationalité. Elle était à peu près stérile pour ceux des pérégrins de race différente, pour ceux des pérégrins et des citoyens. Elle l'était tout à fait pour les pérégrins qui ne faisaient partie d'aucune cité, c'est-à-dire pour les étrangers annexés qui, après leur capitulation (*dediticii*) n'avaient pas reçu de statut local et qui étaient assez rares pratiquement, dont il n'y a pas d'exemple sous l'Empire, sauf peut-être les Juifs depuis la prise de Jérusalem, et pour les citoyens qui avaient perdu la cité à titre de peine sans en acquérir une autre, comme c'est le cas des déportés de l'Empire."

⁵ On the condition of the Jews, cf. Mommsen, in *Historische Zeitschrift* (Munich, 1890), p. 424, n. 1.

⁶ *Dig.* xlviii. 19 (de poenis), 17. 1.—On loss of citizenship, see *supra*, pp. 211 *seq.*

With the Antonine constitution¹ the application of the local systems of law was naturally to a large extent diminished, but they can by no means be said to have been abolished entirely. The question whether Caracalla's gift of the Roman franchise changed the personal law is a subject of controversy. Savigny,² for example, held that it did not, whilst Von Bar's view is to the contrary. In the opinion of the former, the personal rights of a *municipes* who enjoyed Roman citizenship, as well as his native rights, were not determined by his Roman citizenship, but by his *ius originis*. The later writer maintains, however, that this opinion is impaired, in the first place, by the fact that a prominent meaning was attached to Roman citizenship in relation to private rights towards the end of the Empire, and, secondly, by the fact that the real object of the Antonine constitution was to extract succession duties from aliens as well as from Roman citizens. And how could the Roman law of succession, asks Von Bar, have been extended to the citizens of the *municipia*, if the laws of the family and of legal and commercial capacity were not also regulated by Roman jurisprudence? ("Dieser Ansicht widerstreitet in der späteren Kaiserzeit, wo feste politische Rechte des Einzelnen wenig in Frage kamen, die vorherrschend privatrechtliche Bedeutung der Civität, und vollends der bekannte Zweck der Constitution von Caracalla, welcher namentlich die von römischen Erbschaften bezahlten Steuern auch von denen der Peregrinen beziehen wollte. Wie hätte aber das römische Erbrecht auf die Bürger der Municipien angewendet werden können, wenn nicht auch ihr Familienrecht und ihre persönliche Rechts- und Handlungsfähigkeit nach römischen Rechte beurtheilt wäre?"³) The same writer urges, as an additional argument against Savigny,

Effect of the constitution, of Caracalla on the application of the local law.

Savigny's view.

Von Bar's view.

¹ On the rights allowed to peregrins before Caracalla, see *supra*, pp. 230 *seq.*

² *System des heut. röm. Rechts*, vol. viii. § 357.

³ L. von Bar, *Theor. u. Prax. d. int. Privatr.* § 11, p. 21, n. 16.

the fact, recorded by Aulus Gellius,¹ that when Roman citizenship was conferred on Latin towns they lost their marriage laws at the same time.

Criticism of
Savigny's
opinion.

In reference to these two opposed views there is little doubt that the view of Savigny inclines too much to the extreme. The bestowal of the Roman franchise certainly had a great modifying influence on the applicability of the *ius originis* of the many peoples absorbed under the Roman dominion. A good many of their native laws were by the Roman authorities deprived of their operativeness, and provisions drawn from the civil law were substituted therefor, when such native laws were conceived to be prejudicial to the fundamental aims of the Roman policy, and when their maintenance would seriously interfere with the judicial organization. And yet Von Bar's generalization is much too wide, and is far from being tenable in view of several important facts to the contrary. Even if the marriage laws of the Latins were largely supplanted by those of the Romans, it does not follow that every other department of the peregrin legal systems was necessarily swept away. It is quite possible that from a theoretical and more abstract point of view the law of succession may be shown to have relationships with other departments of private law ; so that to modify one of them would necessitate a counterbalancing modification of all the others. But the entire body of private law is not a system marked by absolute unity and harmony. In practice, its parts are not so rigidly connected that an alteration in one would inevitably produce an alteration throughout. The practical necessity of time and place pays but little homage to strict logical consistency, or to the theoretical demands of an abstract system. It is submitted, therefore, that the more correct view is that between these two extremes. Further, it may be urged that even if Caracalla's extension of the franchise changed entirely the *ius originis* of the people then

Objections to
Von Bar's
opinion.

¹ *Noct. Att. iv. 4.*—Cf. *infra*, p. 285.

existing, part of the new population that would subsequently arise would not be, through various causes, vested with the Roman citizenship ; so that to them, at least, the alleged new régime could scarcely apply. In point of fact there were large numbers of people living in the confines of the Empire, who were not citizens, in spite of the new constitution, but were none the less subjects of Rome.¹ Moreover, dispensations were from time to time granted by the emperors to various cities, permitting them to make use of their original laws. Severus and Antoninus allowed in one case a certain divergence from the established Roman law on questions relating to the contract of sale.² Severus recognized the juridical force of long-established custom ('longa consuetudo'), which he instructed the provincial governors to observe (224 A.D.): "Praeses provinciae probatis his, quae in oppido frequenter in eodem genere controversiarum servata sunt, causa cognita statuēt. nam et consuetudo praecedens et ratio quae consuetudinem suasit custodienda est, et ne quid contra longam consuetudinem fiat, ad sollicitudinem suam revocabit praeses provinciae";³ and similarly in a rescript of the year 231 A.D.

Constantine—the disturber of old laws, as he has been described, "novator turbatorque priscarum legum"⁴—tried to destroy the juridical validity of custom (319 A.D.);⁵ but the theory of Julian was antagonistic to this revolutionary measure.⁶ Justinian also recognized the legal importance of custom, and, in

¹ Cf. Mommsen, *Ostgotische Studien*, in Wattenbach's *Neue Archiv*, xiv. pp. 526 seq.

² *Just. Cod.* xi. 32. 1.

³ *Just. Cod.* viii. 52. 1.

⁴ *Amm. Marcell.* xxi. 10. 8.

⁵ *Just. Cod.* viii. 52. 2 : "Consuetudinis ususque longaevis non vilis auctoritas est, verum non usque adeo sui valitura memento, ut aut rationem vincat aut legem."

⁶ *Dig.* i. 3 (de legibus senatusque consultis et longa consuetudine), 32.

his time, inveterate usage was frequently allowed to override the Roman civil law.¹ More examples and details to the same effect will be given below ; but the considerations already advanced are, it is believed, quite sufficient in themselves to show that the *ius originis* of the numerous peoples under the Roman sway was not at all demolished, nor even very largely superseded by the *ius civile*.

Subsequent
rise of conflicts
of laws.

It is, of course, after the fall of the Roman Empire, and the subsequent establishment of a number of European autonomous and independent States, characterized by different local customs, actuated by different needs, and, in consequence, originating different legislations, that the more rapid development of private international law became possible. The conflict of laws resulted from the antagonism of personal to territorial law, each claiming predominance.² Thus, in the Middle Ages we find in the same country, and frequently even in the same city, the Lombard living under the Lombardic law, and the Roman under the Roman law ; and the same distinction applied to the different races of Germans, Goths, Franks, Burgundians, and divers other peoples who, though residing in the same territory, yet enjoyed their respective national laws.³

Modern
indebtedness
to Rome.

Nevertheless this later and more systematic evolution of private international law was an outcome of the

¹ Cf. J. Gilson, *L'étude du droit romain comparé aux autres droits de l'antiquité* (Paris, 1899), pp. 182 seq.

² Cf. U. Huber, *Praelectionum juris civilis tomus tres secundum Institutiones et Digesta Justiniani* (Lovanii, 1766), vol. ii. lib. 1, tit. 3, p. 25 : "Notum est porro, leges et statuta singulorum populorum multis partibus discrepare, posteaquam dissipatis Imperii Romani provinciis, divisus est orbis Christianus in populos ferme innumeros, sibi mutuo non subjectos nec ejusdem ordinis imperandi parendique consortes. In jure Romano non est mirum nihil hac de re extare, cum populi Rom. per omnes orbis partes diffusum et aequabili jure gubernatum Imperium conflictui diversarum legum non aequè potuerit esse subjectum."

³ See Savigny, *Geschichte des römischen Rechts im Mittelalter*, 7 Bde. (Heidelberg, 1834-1851), vol. i. chap. 3.

more rudimentary regulative systems obtaining under the Roman administration. So that it will now be well to consider in what particular cases different rules and legislations were applied, and how far conflicts of laws were involved, and solutions for them attempted. But in this connection, as in many others, it is important to bear in mind that ancient methods were not marked by that scientific cogency which characterizes the modern.

Wrong attitude
of many
modern
writers.

When, by comparison with our modern conceptions, the ancient ideas and practices are found to be deficient in this or that respect it does not therefore follow that they are of no value or that they bear no fundamental relationships to the ideas and practices of a later age or of our present time. This caution is really necessary in view of the fact that so many modern writers are disposed to condemn ancient systems and doctrines because they do not exactly fit in with their pre-judgements or with their interpretation of the conditions prevailing in their own epoch. Such an attitude is perhaps even worse than the contrary tendency to apotheosize indiscriminately and uncritically all that is found in the past.

Before the *lex Iulia* (90 B.C.) conferred on the Latin towns and on the *Socii* full citizenship, they had already observed certain special rules in regard to contracting marriages. Thus Aulus Gellius writes: "Sponsalia in ea parte Italiae, quae Latium appellatur, hoc more atque iure solita fieri, scripsit Servius Sulpitius. . . . Hoc ius sponsaliorum observatum dicit Servius ad id tempus, quo civitas universo Latio lege Iulia data est."¹

Examples of
conflicts of
laws.
Marriage.

Peregrins in general not enjoying the *ius connubii* with Rome, or even with peregrin cities, could enter with the one or the other only into a *matrimonium iniustum*; but peregrins of the same city or of different cities, between which there was *connubium*, could marry according to their own civil law and custom,—as Gaius

Peregrins
possessed of
connubium.

¹ *Noct. Att.* iv. 4.

says: "secundum leges moresque peregrinorum";¹ and such marriages could, under certain circumstances, be transformed into *iustae nuptiae*.² The offspring of a union between peregrins in conformity with their national laws and customs was considered in Rome a *iustus filius patris*.³ Where there was no *connubium* the condition of issue was held to follow that of the mother by the *ius gentium*.⁴

Property of
husband and
wife.

A certain passage in the *Digest* has been considered to have provided a solution to a possible conflict of laws regarding the property of husband and wife. Whether such property was to be regulated in pursuance of the laws of their domicile (as held by some writers) does not, however, distinctly appear; for the passage says that in an action for the recovery of the *dos*, the law of the husband's domicile is applicable, and not of the place where the dotal contract was concluded, as regard must be had rather to the place which the woman herself would have naturally made her home in consequence of the marriage. ("Exigere dotem mulier debet illic, ubi maritus domicilium habuit, non ubi instrumentum dotalis conscriptum est; nec enim id genus contractus est, ut (et) eum locum spectari oporteat, in quo instrumentum dotis factum est, quam eum, in cuius domicilium et ipsa mulier per condicionem matrimonii erat reditura."⁵) Nevertheless, it would appear probable that, when the husband and the wife were of different nationality, their property was regulated by the *lex domicilii*, since their *iura originis* might present provisions of an incompatible nature.

Judging from a decision of the year 124 we find

¹ i. 92.

² Gaius, i. 28 *seq.* (dealing with the rules relating to the status of the offspring of parents of unequal status), and 65 *seq.* (on the modes by which Latin freedmen could become Roman citizens); see *supra*, pp. 257 *seq.*

³ Gaius, i. 77.

⁴ See *supra*, pp. 251 *seq.*

⁵ *Dig.* vi. 1. 65.—Cf. Savigny, *Syst. des heut. röm. Rechts*, § 370.

that in Egypt there was a system of marriage quite different from the Roman, and based on the distinction between written and unwritten marriage contracts.¹ At the end of the second century marriage between brothers and sisters does not seem there to have been considered illegal.²

Marriage in Egypt.

Amongst the Galatians, a paternal power existed in somewhat different form from that of the Roman *patria potestas*. ("Fere enim nulli alii sunt homines, qui talem in filios suos habent potestatem, qualem nos habemus ; . . . nec me praeterit Galatarum gentem credere, in potestate parentum liberos esse." ³)

Paternal power amongst the Galatians.

Most of the peregrin communities had institutions analogous to *tutela* and *curatela*. An alien's testamentary *datio tutelae* for his minor children was recognized if he was a subject of a city where the *datio* was allowed ; for the wardship of children under the age of puberty, says Gaius, is prescribed by every legislation—"sed impuberes quidem in tutela esse omnium civitatum iure contingit." ⁴

Tutela and curatela of peregrins.

By the law of Bithynia a wife was not permitted to enter into a contract without the concurrence of her husband or her son above the age of puberty, as the case may be. ("Apud peregrinos non similiter ut apud nos in tutela sunt feminae ; sed tamen plerumque quasi in tutela sunt : ut ecce lex Bithynorum, si quid mulier contrahat, maritum auctorem esse iubet, aut filium eius puberem." ⁵)

Wife's contract by law of Bithynia.

After release from wardship a minor's estate was managed by a curator until he reached the age at which he was competent to administer his own affairs, and, adds Gaius, the same rule is found amongst other

Minor's estate.

¹ See Girard, *Textes* . . . p. 784.

² Cf. Wilcken, *Berichte* (Berlin, 1883), p. 903 ; and, in the same connection, as to marriage in Athens, see Mommsen, *Römisches Strafrecht* (Leipzig, 1899), p. 116, n. 3, where he refers to Seneca, *Ludus de morte Claudii*, 8, and quotes Wilamowitz-Möllendorff to the same effect.

³ Gaius, i. 55.

⁴ i. 189.

⁵ Gaius, i. 193.

peoples,—“... sicuti apud peregrinas gentes custodiri. . . .”¹

Adoption by a
peregrin.

Adoption by a peregrin in accordance with the laws of his city was recognized as valid in Rome. Thus Cicero writing to Servius Sulpicius Rufus in reference to Lyso, a doctor of Patrae, with whom he had a long-standing tie of hospitality, says: “Without going into details, I commend to you his entire establishment, and among them his young son, whom my client, Cn. Maenius Gemellus, having during his exile been made a citizen of Patrae, adopted in accordance with the laws of that town. I would ask you, therefore, to support his legal claim to the inheritance.” “Quae ne singula enumerem, totam tibi domum commendo, in his adolescentem filium eius, quem C. Maenius Gemellus, cliens meus, quum in calamitate exsilii sui Patrensis civis factus esset, Patrensiu legibus adoptavit, ut eius ipsius hereditatis ius causamque tueare.”²

Emancipation
of slaves.

In the emancipation of a slave by a peregrin the laws of the manumissor were recognized as valid; so that should any dispute arise in this connection in Rome, it was determined by the personal law and not by the *lex loci*.³

Emancipation
of sons.

It has sometimes been held that there is a case of conflict of laws recognized in the following passage of the *Codex*: “Si lex municipii, in quo te pater emancipavit, potestatem duumviris dedit, ut etiam alienigenae liberos suos emancipare possint, id quod a patre factum est suam obtinet firmitatem.”⁴

Baviera,⁵ for example, is of the opinion that this text is an exemplification of the rule ‘locus regit actum.’ The facts of the case are that a man had emancipated his son before the duumviri of another town, and the

¹ i. 197.

² Cic. *Ad Fam.* xiii. 19. 2.

³ Dosithaeus, *Disputatio de manumissionibus*, 12 (in Girard, *Textes*), “Praetor [tamen vel proconsul] non permittet manumissum servire, nisi aliter lege peregrina caveatur.”

⁴ *Just. Cod.* viii. 48 (49) (de emancipationibus liberorum), 1.

⁵ *Loc. cit.* sect. vi.

question was whether such act was valid, as the municipal magistrates had ordinarily had no competence in respect of *legis actio*, statutory process. The decision here pronounced by the Emperors Diocletian and Maximian is that the validity of the act depends on whether the municipal law gives the *legis actio* to the *duumviri*, and allows them to extend it to strangers. Hence this case does not afford an instance of conflicting legislations,—as Savigny remarks: “Von einer Collision örtlicher Rechte ist hier keine Spur.”¹

It would seem that peregrin fathers in certain countries could sell their sons as slaves.²

With regard to the law of property the rules obtaining in the provinces were in many respects different from those prevailing amongst citizens in Rome. For example, the Roman distinction between *dominium ex iure Quiritium* and *in bonis*, between quiritary ownership and bonitary, as has already been pointed out, was not there recognized. As Gaius says, for aliens there was only one *dominium* and only one definition of a proprietor, “... apud peregrinos quidem unum esse dominium; nam aut dominus quisque est, aut dominus non intellegitur.”³ And it is probable that at first the praetor admitted this *unum dominium*, at least respecting movables. As to immovables, it is uncertain.

Examples relating to the law of property.

Quiritary and bonitary ownership.

It has sometimes been inferred, on the basis of certain passages in the *Digest*,⁴ that the different questions relating to movable property were to be determined by the law of the owner's domicile. But it is doubtful whether this inference may justifiably be drawn, at least from the data furnished in these texts. Thus,

Movable property.

¹ *System des heut. röm. Rechts*, vol. viii. § 382, p. 362.—Cf. to the same effect L. von Bar, *op. cit.* § 12, no. 6.

² Cf. Mommsen, *Bürgerlicher und peregrinischer Freiheitsschutz im römischen Staat* (in *Festgabe für Beseler*, Berlin, 1885, pp. 255 *seq.*).

³ ii. 40.

⁴ *E.g. Dig. xx. 1* (de pignor.), 32; xxviii. 5 (de hered. instit.), 35.

in the first of the passages referred to in the last footnote,¹ the question under consideration is simply what are the pertinents of any subject. And in the second passage the fundamental question is how is a testament to be interpreted when two individuals are instituted heirs, one for *res Italicae*, the other for *res provinciales*, both of which kinds of property belonged to the deceased.²

Hypothec.

Syngraphae.
Chirographa.

Before hypothec had been adopted in Roman law, it was customary on provincial territory, *e.g.* in Greece, and was admitted by the praetor.³ Similarly the contracts *syngraphae* and *chirographa* (written acknowledgments of debt or promises to pay, not accompanied by stipulation) were not valid between Roman citizens in the classical epoch, and were peculiar to peregrins,⁴ though valid also between them and Roman citizens.⁵ Even at the time of Gaius they constituted a literal obligation in Greece, being ground to support an action, whatever the subject or form might be. So that in such cases the praetor usually adopted the personal law of the debtor, that is the *ius peregrinorum* and not the *ius gentium*.⁶

Interpretation
of contracts.

It would seem that in regard to the interpretation of a contract there is to be found special provision in

¹ *Dig. xx. i. 32*: "Debitor pactus est, ut quaecumque in praedia pignori data inducta invecta importata ibi nata paratave essent, pignori essent; eorum praediorum pars sine colonis fuit eaque actori suo colenda debitor ita tradidit adsignatis et servis culturae necessariis. . ."

² Cf. Von Bar, *op. cit.* § 12.

³ Cf. Cic. *Ad Fam.* xiii. 56: "Praeterea Philocles Alabandensis ὑποθήκας Cluvio debet."—*Pro Flacco*, 21.

⁴ Gaius, iii. 134: "Praeterea litterarum obligatio fieri videtur chirographis et syngraphis; . . . quod genus obligationis proprium peregrinorum est."

⁵ For examples, cf. Cic. *De harusp. resp.* 13. 16; *Pro Rabirio*, iii. 6; *Ad Att.* v. 1, 2, 3; v. 21.—For further particulars as to *syngraphae*, see Voigt, *Das jus nat.* vol. iv. pp. 326-332.

⁶ M. Duguit (*Des conflits de législation relatifs à la forme des actes civils*, Bordeaux, 1882, p. 10), maintains that the *ius gentium* alone applied as between citizens and peregrins; but the cases mentioned by Cicero in the preceding note directly contradict this contention.

the *Digest*. Thus it is laid down, in view of any conflict of laws, that the question is ordinarily to be determined by considering the express intentions of the parties, but that if they are not clearly expressed then the custom of the locality in which the engagement was entered into must decide the matter. "Semper in stipulationibus et in ceteris contractibus id sequimur, quod actum est; aut, si non pareat quid actum est, erit consequens, ut id sequamur, quod in regione in qua actum est frequentatur. quid ergo, si neque regionis mos appareat, quia varius fuit? ad id, quod minimum est, redigenda summa est."¹

There were special provisions amongst aliens as to the establishment of obligations by oath alone. Gaius, speaking of the cases in which an obligation is contracted by a declaration of one of the parties without any previous interrogation, says that the only instance in Roman law is the promise of a freedman to his patron, but that other cases could be found in the particular laws of foreign communities.²

In various provincial territories there were also special rules relating to the *bona vacantia* of persons dying intestate,³ as also in reference to liens and other matters. Thus at the time of Trajan several towns of Bithynia and Pontus could exercise certain rights over their debtors' property, as provided by their respective laws.⁴

¹ *Dig.* l. 17 (de div. reg. iur.), 34.—Cf. Savigny, *System des heut. röm. Rechts*, vol. viii. §§ 372, 374.

² *iii.* 96: "Sane ex alia nulla causa iureiurando homines obligantur utique cum quaeritur de iure Romanorum. nam apud peregrinos quid iuris sit, singularum civitatum iura requirentes aliud intellegere poterimus."

³ *Plin. Epist.* x. 88: "Nicensibus, qui intestatorum civium suorum concessam vindicationem bonorum a divo Augusto affirmant."

⁴ *Plin. Epist.* x. 109-110: "Quo iure uti debeant bithynae vel ponticae civitates in iis pecuniis, quae ex quaque causa reipublicae debebuntur ex lege cuiusque animadvertendum est."—See also *Dig.* xlii. 5 (de reb. auct. iud.), 37: "Antiochensium Coelae Syriae civitati, quod lege sua privilegium in bonis defuncti debitoris accepit, ius persequendi pignoris durare constituit."

Fidepromissio.

In the case of *fidepromissio*, too, the peregrin law was admitted. Thus in Roman law the obligation of a fidepromissor was not transmissible to his heirs ; but it was otherwise if he was an alien, and if the law of his municipality was in that respect different from the Roman. "Praeterea sponsoris et fidepromissoris heres non tenetur, nisi si de peregrino fidepromissore quæramus, et alio iure civitas eius utatur,"¹—from which it appears that in Rome the personal law was in such cases adopted even if it differed from the local law ; in other words the *lex loci* gave way to the *ius originis*. There is, however, by no means unanimity of opinion as to such interpretation of this text. Thus Walter maintains that the provisions mentioned by Gaius applied to peregrins when residing on provincial territory.²

Testamentary provisions.

Again the rules concerning wills varied more or less according to locality, but they were deemed valid in Rome if executed in conformity with the personal law of the testator. Ulpian, speaking of the testamentary incapacity of the Junian Latins and of the *dediticii*, says that in the case of the first the disability was imposed by the *lex Iunia*, and in the case of the second it was due to the fact that the *dediticius* could not make a will either as a Roman or as a peregrin, since he was not a recognized subject of any ascertained State ; for only those who were subjects of a given State could exercise the right in accordance with its laws.³

¹ Gaius, iii. 120.

² *Gesch. des röm. Rechts*, vol. i. § 115, p. 162.—As to the relationship, in this respect, between *ius civile*, or *ius provinciale*, and *ius gentium*, Voigt says (*Das jus nat.* vol. iv. p. 322) : "Das ius gentium und das ius civile oder ius provinciale stellen direct widerstreitende Rechtsätze auf. Dieser Fall kommt regelmässig nicht vor, da, wo zwischen ius gentium und ius civile ein solcher Widerstreit entstand, alsbald die Rechtstheorie zu Gunsten des einen oder anderen entschied und den Widerspruch vermittelte, während in den iura provincialia in gleicher Weise die dem ius gentium direct widerstreitenden Rechtssatzungen wahrscheinlich sehr früh zu Gunsten des Letzteren beseitigt wurden."

³ *Reg.* xx. 14, 15 : "Latinus Iunianus, item is qui dediticiorum numero est, testamentum facere non potest [cf. Gaius, i. 22-25]."

It may be here noted that the rescript of Diocletian,¹ already referred to,² does not, strictly speaking, supply a solution to conflicts of legislation respecting the form of wills. For, as Savigny has observed, if this text dealt with a veritable case of conflict, then the words 'patriae tuae' would apply to the law of the domicile of the heiress; and a pronouncement to this effect could scarcely be good law. It would accordingly follow that the passage is to be constructed on the obvious understanding that the domicile of the heiress was the same as that of the testator, and in that domicile he had executed his testament. "Allein dieser Schein [referring to the semblance of a conflict] verschwindet wieder, wenn man erwägt, dass doch unmöglich die *patria* der Erbin entscheidend seyn könnte; wo das Testament gemacht war, wird gar nicht gesagt. Wahrscheinlich hatte der Verstorbene in seiner Heimath testirt, die auch die Heimath der Erbin war."³ So that the rule 'locus regit actum' is not here really concerned; the only conflict is between the particular law and the common law, and the former is made to prevail over the latter,— "dass in der Collision das Particularrecht dem gemeinen Recht vorgeht."⁴

Diocletian's
rescript—
and conflict
as to wills.

Another case that has been advanced as offering a solution to a collision of laws is the provision⁵ that wills

Publication of
wills.

Latinus quidem, quoniam nominatim lege Iunia prohibitus est; is autem qui dediticiorum numero est, quoniam nec quasi civis Romanus testari potest, cum sit peregrinus, nec quasi peregrinus, quoniam nullius certae civitatis civis est, ut secundum leges civitatis suae testetur."

¹ *Just. Cod.* vi. 23 (de testam.), 9.

² *Supra*, p. 279.

³ *System des heut. röm. Rechts*, § 382, p. 361.

⁴ *Ibid.*

⁵ *Just. Cod.* vi. 32 (quemadmodum aperiantur testamenta et inspiciantur et describantur), 2: "Impp. Valerianus et Galienus, an. 256: Testamenti tabulas ad hoc tibi a patre datas, ut in patria proferantur, adfirmans potes illic proferre, ut secundum leges moresque locorum insinuentur, ita scilicet, ut testibus non praesentibus adire prius vel pro tribunali vel per libellum rectorem provinciae procures ac permittente eo honestos viros adesse facias, quibus praesentibus aperiantur et ab his rursum obsignentur."

are opened and made public in accordance with the custom of the place where this proceeding takes place. This enactment, it is true, makes no mention of different legislations, and has little kinship with the private law of obligations,¹ but, along with several other provisions, it clearly indicates that the Romans were not at all blind to the claims of different legal systems, that they were by no means ignorant of the rule '*locus regit actum*,' and that they frequently attempted adjustments of the difficulties arising from antagonistic or inconsistent legislations by applying this rule; at all events it shows a recognition on their part of the necessity to limit the application of the principle of personality, inasmuch as the *ius originis* was not infrequently superseded by the *lex loci*.

Intestate
succession.

Further, in reference to intestate succession the peregrin law was similarly applied. Cicero relates that an inheritance of 500,000 sesterces was left to Epicrates, the most notable citizen of Bidis, a small town near Syracuse; the testatrix, he says, was so near a relative that had she died even without having made a will, Epicrates would have been considered her heir in pursuance of the laws of his town.²

And it has been claimed by some writers that a certain text in the *Digest*³ shows that where a question involving conflicting laws of succession should arise, it was to be settled by applying the law of the domicile of the deceased. The passage, however, does not really bear

¹ Cf. Von Bar, *op. cit.* § 12, no. 6.

² *In Verrem*, ii. 2. 22: "Bidis oppidum est tenue sane non longe a Syracusis. Huius longe primus civitatis est Epicrates quidem. Ei hereditas HS quingentorum millium venerat a muliere quadam propinqua, atqui ita propinqua ut, ea etiamsi intestata esset mortua, Epicratem Bidinorum legibus heredem esse oporteret." Cf. Cic. *Ad Fam.* xiii. 30.—As to intestate succession in Egypt, cf. a decision of the year 135, in Girard, *Textes*, p. 787.

³ *Dig.* v. 1 (de iud.), 19, *pr.*: "Heres absens ibi defendendus est, ubi defunctus debuit, et conveniendus, si ibi inveniatur, nulloque suo proprio privilegio excusatur."

this interpretation. It simply provides that actions for the recovery of debts due by the deceased must be brought against his heir in the place where the former was domiciled;¹ for there the heir is liable, as Ulpian says, if he is not protected by any special ground of exemption peculiar to himself.

Again, does a conflict arise in regard to the rules of jurisdiction mentioned in the *Digest*? Paulus says that an officer who exercises jurisdiction outside his local limits may be disobeyed with impunity, and that the same rule holds good should he affect to exercise jurisdiction beyond his prescribed competence.² Here we have merely a question relating to the jurisdiction of the native Roman judge. With this passage may be compared the observation of Ulpian that if a prefect goes beyond the bounds of the city his authority does not hold, though he can appoint a *iudex* outside the bounds.³ And elsewhere the same jurist says that as soon as the proconsul passes the gate on entering Rome, he lays aside his imperium.⁴

Did Rome recognize the territorial sovereignty of the law? It cannot be claimed that the Romans systematically emphasized this principle and invariably acted in conformity with it. As they usually permitted aliens to have recourse to their own particular legal systems and customs, the solution of real conflicts of legislation was *ipso facto* avoided.⁵ In comparison with the legislative policy of modern nations, Rome undoubtedly concerned herself but little with the task of effecting a

¹ Cf. Von Bar, *op. cit.* § 12.

² *Dig.* ii. 1 (de iuris.), 20: "Extra territorium ius dicenti impune non paretur. idem est et si supra iurisdictionem suam velit ius dicere."

³ *Dig.* i. 12. 3: "Praefectus urbi cum terminos urbis exierit, potestatem non habet; extra urbem potest iubere iudicare."

⁴ *Dig.* i. 16. 16: "Proconsul portam Romae ingressus deponit imperium." Cf. Von Bar, *op. cit.* § 12, no. 3.

⁵ See Weiss, *op. cit.* vol. iii. p. 126.

'Locus regit actum.'

reconciliation between personal law and territorial law, between personal sovereignty and territorial sovereignty, by determining the limits of their respective applicability. The rule 'locus regit actum'—that is, the recognition of the form of a juridical act if it be in accordance with the law of the place where the act was executed, even though another form be prescribed by the law of the place where the legal relation has its seat¹—never obtained distinct and regular acceptance. Where there was any incompatibility between the *ius originis* and the *ius domicilii* of the parties concerned, the former, as has been shown, was usually applied; but, considering the various cases that have already been brought forward, it cannot be maintained that it was exclusively applied. Considerations of State interest and public policy (which will be further exemplified below) conduced largely to these somewhat irregular oscillations in practice.

Local custom and conflicts.

In addition to the examples which have been given to show that an effort was made by the Romans to adjust peacefully conflicts of laws, one may recall a noteworthy case in the twenty-fifth book of the *Digest*.² This states that the praetor will not necessarily allow the omission, caused through ignorance or inadvertence, of certain prescribed formalities to prove detrimental to the heir, and emphasizes that to determine certain facts relating to the alleged existence of an unborn heir, it is necessary to follow the custom of the place,—“... mos regionis inspiciendus est.”

Local custom in reference to the usury laws.

Again, in connection with the usury laws it was laid down that a judge in a bona-fide action must decide according to the custom of the locality where the

¹ Savigny, *System des heut. röm. Rechts*, § 381.

² *Dig. xv. 4. 1. 15*: “Quod autem praetor ait causa cognita se possessionem non daturum vel actiones denegaturum, eo pertinet, ut, si per rusticitatem aliquid fuerit omissum ex his quae praetor servari voluit, non obsit partui. Quale est enim, si quid ex his, quae leviter observanda praetor edixit, non sit factum, partui denegari bonorum possessionem; sed mos regionis inspiciendus est, et secundum eum et observari ventrem et partum et infantem oportet.”

contract in dispute was entered into (*lex loci contractus*), but on condition that this custom is not contrary to the law. "Cum iudicio bonae fidei disceptatur arbitrio iudicis usurarum modus ex more regionis, ubi contractum est, constituitur; ita tamen ut legi non offendat."¹ Here it is seen that the principle of public utility is insisted on, and even made to predominate when in opposition to the doctrine of territoriality.

Another important instance indicating a distinct provision for solving a conflict of laws is found in the twenty-second book of the *Digest*, where, after saying that witnesses are not to be summoned when their homes are situated at a great distance from the court, or under the pretext of calling away soldiers from their flags or posts, a rescript of the Emperors Severus and Antoninus laid down that in the matter of summoning witnesses the judge must carefully examine the custom of the place where he exercises jurisdiction,—"*diligentiae iudicantis est explorare, quae consuetudo in ea provincia, in quam iudicat, fuerit*"; and if it be proved that witnesses, domiciled in another town, have often been summoned, there is then no doubt that such as are by him deemed necessary in the case may be called.²

Local custom
and the
summoning of
witnesses.

A further case is furnished in the sixth book of Justinian's *Code*, where it is provided that in those regions where there are illiterate inhabitants incapable of fulfilling the technical requirements of the law relating to the making of wills, their long-established custom may be allowed to prevail. "In illis vero locis, in quibus raro inveniuntur homines litterati, per praesentem

Local custom
and neglect of
technical
requirements.

¹ *Dig.* xxii. 1, 1, *pr.*

² *Dig.* xxii. 5 (de testibus), 3. 6: "Testes non temere evocandi sunt per longum iter et multo minus milites avocandi sunt a signis vel muneribus perhibendi testimonii causa, idque divus Hadrianus rescripsit. Sed et divi fratres rescripserunt: 'Quod ad testes evocandos pertinet, diligentiae iudicantis est explorare, quae, consuetudo in ea provincia, in quam iudicat, fuerit.' Nam si probabitur saepe in aliam civitatem testimonii gratia plerosque evocatos, non esse dubitandum, quin evocandi sint, quos necessarios in ipsa cognitione deprehenderit qui iudicat."

legem rusticanis concedimus antiquam eorum consuetudinem legis vicem obtinere.”¹

The principle of territoriality in treaties.

Between Rome and Carthage.

Again,—to return to an earlier age—in the first treaty between Rome and Carthage (c. 509–8 B.C.) there is a clause which shows that even at that early date both the Romans and the Carthaginians had some notion of the principle of the territoriality of the law, as a means of reconciling conflicting legislations. This clause, as given by Polybius, is to the following effect: “That those who land for traffic shall not conclude any bargain except in the presence of a herald or town-clerk. That whatever is sold in their presence, the price is to be secured to the seller on the credit of the State, that is in the case of such sales as are effected in Libya or Sardinia.”²

Between Rome and Chios.

And in the treaty between Rome and Chios³ (as in the Greek treaty between Lato and Olus)⁴ the existence of a similar conception is apparent.

The Romans recognized the rule—
‘locus regit actum.’

From these considerations, and having regard to the totality of their significance, it is evident that the Romans not only knew well the principle of ‘locus regit actum,’ but that at times they deliberately applied it in practice. No doubt their recognition of it, as in the case also of the Greeks, did not manifest itself to the same extent as in modern times;⁵ but it is equally

¹ *Just. Cod.* vi. 23 (de testamentis: quemadmodum testamenta ordinantur), 31.

² Polyb. iii. 22 : τοῖς δὲ κατ’ ἐμπορίαν παραγινομένοις μηδὲν ἔστω τέλος πλὴν ἐπὶ κήρυκι ἢ γραμματεῖ· ὅσα δ’ ἂν τούτων παρόντων πραθῇ, δημοσίᾳ πίστει ὀφειλέσθω τῷ ἀποδομένῳ, ὅσα ἂν ἢ ἐν Λιβύῃ ἢ ἐν Σαρδόνι πραθῇ.—For the entire treaty, see *infra*, chap. xvii.

³ *Corp. inscrip. Graec.* 2222, ll. 15–20. Cf. *supra*, latter part of chap. viii.

⁴ *Corp. inscrip. Graec.* 2554, ll. 56–76. See *supra*, chap. viii. in *fin.*, and *infra*, chap. xvii.

⁵ Cf. Baviera, *loc. cit.* vol. ii. fasc. 3, p. 439 : “Non l’avranno concepito in tutta la sua estensione datale ai nostri giorni, ma ne ebbero però una nozione chiara.” Chénou, *loc. cit.* pp. 239–241, and Weiss, *op. cit.* vol. iii. p. 126, incline to the view that the Romans did not recognize the principle; but the examples above set forth are, it is submitted, sufficient refutation of this view.

indubitable that our fuller, more systematic ideas on the subject owe their origin to the more rudimentary notions of the ancients.

Similarly, the Romans had thorough cognizance of the doctrine of public order. (This is here mentioned in view of the fact that the principle appears to be insisted on by many writers, especially French and Italian, as a necessary criterion in private international law; though it must be confessed that it is somewhat vague and ambiguous.¹) In the application of competing laws, the *ius peregrinorum* was frequently displaced by the Roman *ius civile*, and also by the *ius gentium*, when the interest of State or public morality was endangered.² Thus in 193 B.C. the usury laws, which till then applied only to Romans, were extended to peregrins; and the measure proved a salutary one in view of the growing influence of foreigners in Rome. In this way the Sempronian plebiscite³ (the *lex Sempronia de fenore*) subordinated the personal law of aliens to public utility. In connection with the same subject the principle is again emphasized five centuries later by Papinian. In 143 B.C. the *lex Didia de sumptu* extended to peregrins, in the interests of public morality, the provisions of the *lex Fannia cibaria* (161 B.C.) passed some twenty years earlier for Roman citizens. A senatusconsult of Hadrian extended to peregrin debtors the prohibition to manumit slaves, under cover of good faith, in fraud of their creditors.⁴ The laws relating to theft, as also

Recognition
of the
doctrine of
public order.

Usury laws.

*Lex Didia de
sumptu.*

Hadrian's
senatus-
consult.

¹ On the significance and applicability of this principle, cf. Von Bar, *op. cit.* § 30.

² Cf. Chénon, *loc. cit.* pp. 241 *seq.*

³ Liv. xxxv. 7: "M. Sempronius tribunus plebis ex auctoritate patrum plebem rogavit, plebesque scivit, ut cum sociis et nomine latino pecuniae creditae ius idem quod cum civibus Romanis esset."

⁴ Gaius, i. 47: "... ut creditorum fraudandorum causa manumissi liberi non fiant, hoc etiam ad peregrinos pertinere (senatus ita censuit ex auctoritate Hadriani)..."

Lex Aquilia. the *lex Aquilia* (287 B.C.) were, by legal fictions, likewise made to apply to aliens.¹

Restrictions
as to the
ius gentium.
Lex Minicia. Again, public interest in some cases necessitated certain restrictions in the application of the *ius gentium*.² Thus the *lex Minicia* provided that the

Sc.
Claudianum.

issue of a peregrin husband and Roman wife should be peregrins,³ although the principle of the *ius gentium* was 'partus sequitur ventrem.' The *Senatusconsultum Claudianum* decided that offspring of a Roman woman and another's slave, in spite of his master's assent to the union, should be of servile condition; but later Hadrian reversed this provision.⁴

Restrictions
as to *fidei-*
commissa.

Certain restrictions in regard to *fideicommissa* were also placed on peregrins proper (though not on Latins), probably to prevent their acquiring excessive wealth, which might prove detrimental to Roman citizens. Thus Gaius says that by a decree of the senate, passed on the proposition of Hadrian, property devised in trust for the benefit of aliens was to be confiscated. "...Nunc ex oratione divi Hadriani senatusconsultum factum est ut ea fideicommissa vindicarentur."⁵

Few cases of
conflicts of
laws.

Reasons for
this.

It cannot be denied that in the very large mass of Justinianian compilations we find comparatively few direct references to conflicts of laws. One reason for this is, as Von Bar points out—and at the same time suggests an additional argument against his own contention, at least so far as the earlier Roman praetors are concerned—that such questions would have been regarded as relatively antiquated by the compilers and jurists of the time. Another reason—operating, of

¹ Gaius, iv. 37.

² Chénon, *loc. cit.* pp. 243 seq.

³ Gaius, i. 78; Ulpian, *Reg.* v. 8; and see *supra*, p. 252.

⁴ Gaius, i. 84; see *supra*, p. 253.

⁵ Gaius, ii. 285.—Not long ago in England land purchased by or devised to an alien was forfeited to the Crown. And similarly in France, an alien formerly did not possess testamentary capacity, his property at his death escheating to the Crown by the 'droit d'aubaine.'

course, in the later Roman law—lies in the centralization of the Roman Empire, the gradual extension of citizenship and adoption of the civil law (which consequently mitigated the tendencies to establish local and customary laws), and the application of *bona fides* to the solution of matters where differences did actually exist.¹ This being so, relationships between Roman tribunals and those of foreign communities were minimized. Under the Empire, supreme jurisdiction was exercised by Rome over all courts on Roman and imperial territory; and such peoples as were not subject to Roman dominion were of so low a grade of civilization that the question of adjusting conflicts of laws could scarcely arise.²

Now this contention of Von Bar is, it is submitted, of too extreme a nature, in view of the considerations and examples advanced above. No one has attributed to Rome a perfect system of private international law. But it is impossible to deny that Roman jurisprudence had rules for limiting the application of the personal law of different peoples involved, and for regulating the conflicts regarding the rights and duties of persons subjected to different legislations and systems of determinate States vested with juridical personality. And this is the vital substance of private international law.

Von Bar's
view—too
extreme.

¹ Von Bar, *op. cit.* § 12, p. 22: "Die von Justinian veranstalteten Rechtsbücher konnten ihrem ganzen praktischen Zweck nach, wenn etwa über die Collision der verschiedenen Gesetze in den Schriften der classischen Juristen sich noch Erörterungen fanden, diesen bereits lange veralteten Stoff um so weniger aufnehmen, als sicher im römischen Reiche der grossen Centralisation wegen, und weil das römische Privatrecht als Vorrecht der Bürger gegenüber den unvollkommenen Freien, den *dediticiis* und *Latinis Junianis*, geachtet und bewahrt wurde, nur unbedeutende particulare Gewohnheitsrechte, vielleicht nur was den Inhalt der obligatorischen Rechtsgeschäfte betrifft, sich gebildet hatten. In letzterer Hinsicht aber konnte bei der grossen Ausdehnung, welche das Princip der *bona fides* in späterer Zeit erlangte, im Einzelnen leicht geholfen werden."

² *Ibid.* § 12, *fin.*

CHAPTER XIII

AMBASSADORS—THEIR FUNCTIONS; THEIR RIGHTS AND DUTIES

Rise of
diplomacy.

AMONGST the peoples of the most distant antiquity there were practices, more or less systematic, relating to the interchange of embassies. As soon as human beings begin definitely to arrange themselves into groups—families, tribes, or nations—relationships between them become regularized; and diplomacy and intertribal or interstatal law consequently come into existence. At a more advanced stage of evolution, we find regular treaties established for the deliberate organizing and controlling of certain clearly-defined relationships; and such treaties are not always—to use a phrase of Montesquieu¹—merely the voice of nature claiming its rights, but are frequently the outcome of a spontaneous feeling, on the part of the respective groups, of self-insufficiency, and of a consequent desire, universally experienced, to promote intercourse, to give an impulse to national development, and to define more clearly the extent of national rights and obligations regarding matters that were before then doubtful and of precarious applicability. “La diplomatie est vieille comme le monde,” says a modern French writer, “et ne périra qu’avec lui. La Bible, les Egyptiens, les Grecs ont un droit international et diplomatique. Il suffit que deux sociétés coexistent pour qu’elles aient des intérêts à régler : elles font la guerre, par conséquent la paix, et même les insti-

¹ *Lettres persanes*, xcvi. : “... la voix de la nature qui réclame ses droits.”

tutions internationales représentent, malgré leurs fragilités apparentes, ce qu'il y a de moins variable et de plus indélébile."¹

In the ancient States of China we hear of the inter-
change of embassies accompanied by established ceremonies and formalities indicating a consciousness of the importance of the proceedings, which were always characterized by extreme courtesy. Questions of precedence regarding envoys were determined by settled principles. The ancient Hindoos had a similar system, and also employed special officials, in addition to the usual heralds, for any necessary relationships with enemy countries.² The *Mánava Dharmásátras* (the Institutes of Manu), the origin of which has been ascribed to different dates varying between 1200 B.C. and 200 B.C., contained a code of diplomatic regulations. The ancient Egyptians undoubtedly possessed something of the same kind. And amongst the more primitive races of to-day we find practices of a like nature. Thus in the Fiji Islands intercourse between group and group, whether in peace or in war, is conducted through the medium of heralds, who are considered inviolable at all times;³ similarly, amongst the Australian tribes.⁴

In Greece and Rome diplomatic relationships, though not based on the institution of permanent embassies in the modern sense, yet attained to a very high state of development. From one point of view, however, the Roman fetials may be regarded, in reference to certain questions arising out of war or relating to extradition and demands for satisfaction in general, as permanent

¹ R. de Maulde-la-Clavière, *La diplomatie au temps de Machiavel* (Paris, 1892), t. i., avant-propos, p. 1.

² Cf. Haelschner, *De iure gentium quale fuerit apud gentes Orientes* (Halae, 1842), p. 37.

³ F. Ratzel, *Völkerkunde* (Leipzig, 1885), vol. ii. p. 283: "Der Verkehr von Stamm zu Stamm ist in Fidschi Herolden übertragen, welche auch da, wo sie als Kriegsankündiger auftreten, unverletzlich sind."

⁴ Cf. G. C. Wheeler, *The tribe and intertribal relations in Australia* (London, 1910).

Exchange of
embassies in
ancient China.

In ancient
India.

Amongst
uncivilized
peoples.

In Greece and
Rome.

No permanent
embassies.

Richness of
diplomatic
terminology.

Kinds of
envoys and
ambassadors.
ἄγγελος.

Legatus.

ambassadors, though rather potential than actual.¹ The practice of permanent embassies was really introduced after the Peace of Westphalia (1648), which secured the independence and autonomy of European States, and at the same time promoted commercial and diplomatic relationships between them. And yet in many matters relating to the proceedings of ambassadors and to their rights and obligations, these ancient peoples had quite as comprehensive ideas as the modern nations. In the language of Greek diplomacy, and to a somewhat less extent in that of the Roman, we find a remarkable richness of terminology.² There were some dozen terms used to designate the different kinds of treaties that could be concluded, and the same number to differentiate between the various kinds of ambassadors and envoys, according to the nature and purpose of their respective missions.

In Homer and Herodotus the word *ἄγγελος* is used with the general meaning of messenger or envoy,³ much in the same way as *legatus* is used in Latin; and so we get the phrase *ἄγγελὸν ἐλθεῖν*⁴ (as also *ἐξεσὶν ἐλθεῖν*)⁵ as equivalent to the Latin 'legationem obire.'⁶ In Polybius⁷ *ἄγγελος* is used also like the Latin *nuncius* for the message itself. In Pausanias⁸ is found again a trace of the older meaning of *ἄγγελος* as *legatus*. In the later usage, a frequently employed term for ambas-

¹ On the fetials, see *infra*, chap. xxvi.

² Cf. Pollux, viii. 11. 137 as to the terminology respecting ambassadors and other envoys and their functions; and see the copious notes on the passage in the Amsterdam folio edition, 1706.—Pollux there mentions, amongst other kindred words and expressions, *πρέσβεις*, *πρεσβευταί*, also *διάκονος* (in Latin *minister*), servant, attendant, *ἄγγελος*, *κῆρυξ*, *σπονδοφόρος* (a term used by Dionysius of Halicarnassus for *fetialis*), and also a large number of expressions to indicate their functions.

³ Cf. *Iliad*, v. 804; xi. 286, etc.

⁴ *Iliad*, xi. 140; cf. *Odys.* xxi. 20.

⁵ *Iliad*, xxiv. 235.

⁶ Cf. P. C. Buttmann, *Lexilogus* . . . (Berlin, 1837, 1860), ii. p. 202.

⁷ *E.g.* i. 72. 4.

⁸ vii. 1. 2.

sadors is *πρέσβεις*, its singular form *πρέσβυς* being *πρέσβεις*. more usual in the poets,¹ whilst *πρεσβευτής*² is more common in the prose writers; the plural *πρεσβευταί* is also found in prose writings.³ And so we have the corresponding verb *πρεσβεύειν*,⁴ signifying to go on an embassy, to negotiate (as an ambassador).

Sometimes *orator* is used as synonymous with *legatus*,⁵ *Orator*. though generally *orator* suggests rather an envoy sent to beseech, to pray for certain things or conditions; so that, in this respect, Festus says: "Oratores ex graeco ἀρᾶσθαι dicti, quod missi ad reges nationesque, deos solerent testari"⁶; and Livy⁷ and Virgil⁸ already use the word to signify political envoys. In French, it appears, *orateur* had the meaning of ambassador until the end of the fifteenth century.

In the sense of plenipotentiaries ambassadors are sometimes termed *αὐτοκράτορες*,⁹ especially so when *αὐτοκράτορες*. charged with the conclusion of a treaty. (The adjective *αὐτοκράτωρ* means one's own master in the same way as the Latin *sui iuris*; as applied to States, it means free and independent.¹⁰)

¹ Cf. Aeschylus, *Suppl.* 728:

ἴσως γὰρ ἢ κήρυξ τις ἢ πρέσβυς μόλοι
(where he speaks of the arrival of some herald, *κήρυξ*, or ambassador).

² E.g. Thuc. v. 4, etc.; and cf. *Corp. inscrip. Graec.* i. 1237, 1239, 1240, etc.

³ Thuc. viii. 77; Andoc. *De pace*, 41.

⁴ Andoc. *De pace*, 34; Plato, *Hippias Major*, 281 B; *Charm.* 158 A; Xenoph. *Cyr.* v. 1. 2; Eurip. *Heracl.* 479; and similar usage by Demosthenes, Dinarchus, Isocrates, etc.

⁵ Ulpian, in *Dig.* xlviii. 6 (ad leg. *Inl. de vi publ.*), 7.

⁶ Cf. Terence, *Prolog. Hecyr.* 9:

"Orator ad vos venio ornatu prologi;
Sinite, exorator sim . . ."

⁷ i. 15: "Veientes pacem petitum oratores Romam mittunt."

⁸ *Aen.* xi. 331:

"Centum oratores prima de gente Latinos
Ire placet pacisque manu praetendere ramos."

⁹ Cf. Aristoph. *Pax*, 359: *αὐτοκράτορά τινα ἐλᾶσθαι*; Aristoph. *Aves*, 1595, where it is used with *πρεσβεύς*.

¹⁰ Thuc. iv. 63; Xenoph. *Memor.* ii. 1. 21.

ἀρχιπρεσ-
βευτής.
'Princeps
legationis.'

ἀρχιθέωρος.
θεωρός.

The head of an embassy is, in the later Greek writers, described as ἀρχιπρεσβευτής, the corresponding Latin being 'princeps legationis.' But this Greek term, used by such writers as Diodorus¹ and Strabo,² was unknown in more classical times, and is not found in inscriptions. On the other hand, ἀρχιθέωρος³ is frequently used as the head of a sacred embassy (θεωρία), the θεωρός⁴ (and συνθέωρος,⁵ colleague in the mission) being an ambassador sent to consult an oracle, to present some offering, or to perform some religious rite at the games; but exceptionally the word was used for πρεσβευτής as a mark of distinguished regard or flattery, as in the case of the deputies sent by the Athenians to Antigonos and his son, Demetrius Poliorcetes.⁶

κήρυκες.
Praecones.
Caduceatores.
Fetiales.

The more preliminary proceedings relating to specific embassies were usually in the hands of heralds or marshals (κήρυκες), to whom the Roman *praecones* or *caduceatores*⁷ more or less correspond. *Legati* and *fetiales*⁸ were also employed for the same purpose, the latter being, in the time of the Roman Republic, the usual envoys in warlike relationships.⁹ From the earliest heroic times they were conceived to be under the immediate protection of Zeus. In Homer they are frequently spoken of as θεῖοι, Διὸ φίλοι,¹⁰ and Διὸς ἄγγελοι ἡδὲ καὶ ἀνδρῶν,¹¹ the messengers of God and men; and accordingly they were employed to convey messages between enemies.¹² Later their functions were

¹ xii. 53. 2; xiii. 52. 2; xiv. 25. 1.

² p. 796c.

³ Arist. *Eth. Nic.* iv. 2. 2; Andoc. *De myst.* 132; *Corp. inscrip. Graec.* 3656 (decree of the Rhodians).

⁴ *Corp. inscrip. Graec.* 1693.—Cf., however, no. 2271, a case where a πρεσβευτής was charged with a religious as well as a political mission.

⁵ *Corp. inscrip. Graec.* vol. ii. p. 226.

⁶ Plut. *Demetr.* 11.

⁷ Quint. Curt. iv. 2: "... caduceatores, qui ad pacem eum compellerent, misit." (But here the word is used in a somewhat wider sense than that of mere herald.)

⁸ See *infra*, chap. xxvi.

⁹ Dig. i. 8 (de rer. divis.), 8. 1.

¹⁰ *Iliad*, iv. 192; viii. 517.

¹¹ *Iliad*, i. 334, etc.

¹² *Iliad*, ix. 170; xxiv. 149, 178; *Odys.* x. 59, 102.

of a somewhat similar character, and they were distinguished from *πρέσβεις* in that the *κήρυκες* were sacrosanct by virtue of their having been merely appointed to the office, and without any further formalities, whilst the *πρέσβεις* enjoyed a recognized security, so far as this was indispensable to the purposes for which they were despatched. The *κήρυκες*, again, were messengers between States only, or at all events, usually, when a state of war existed between them;¹ and they always carried a staff, as symbol of their office.² The Romans did not make such a distinction between heralds and ambassadors proper.

An ambassador who was sent to a congress as a *σύνεδρος*. select commissioner sitting in council took the special title of *σύνεδρος*.

If the envoy was sent specially with the object of *ἐκδικος*. demanding satisfaction for an offence, and to expound the necessary representations for that purpose, he was sometimes termed *ἐκδικος*, and his function was *ἐκδίκη* or *ἐκδίκησις*.³

Again, in reference to the Roman *legatio*, this word *Legatio—mission.* is sometimes used in the abstract sense of mission, and sometimes in the sense of envoy ('mittere legationem ad aliquem'⁴), or legation, comprising all the persons attached thereto,—as when Cicero speaks of 'orba legatio' ('orphaned legation'), owing to the death of the head.⁵

It is important to distinguish the *legati* who accompanied the *praesides provinciae* (provincial governors), *Legati—distinction.* from the *legati Augusti* who from the time of the Empire were sent to the *provinciae Caesariae* vested with proconsular power in their respective provinces,

¹ Cf. Schol. ad Thuc. i. 29.

² Cf. C. Ostermann, *De praeconibus Graecorum* (Marburg, 1845), *passim*, esp. pp. 16 *seq.*, p. 93.

³ See Cic. *Ad Fam.* xiii. 56; Plin. *Epist.* x. 111; *Corp. inscrip. Graec.* no. 356.

⁴ Quintil. *Inst.* x. 1.

⁵ *Phil.* ix. 1.

and from the *legati legionum* who were commanders in the field.

Legatio libera. *Legatio libera*, 'free legation,' was permission granted to a senator to visit the provinces on his private affairs, under the semblance of an ambassador, but without taking part in any diplomatic functions.¹ It was called 'free' because he could return to Rome and leave again without necessitating his resignation. In the time of Cicero there was such a scandalous abuse of the *legatio libera* that in his consulship he endeavoured to bring about an entire abolition of the practice; he succeeded, however, only in obtaining a *senatusconsult* by which such legations were limited to one year.²

Legatio votiva. *Legatio votiva* was a 'free legation' assumed for the purpose, which was frequently a mere pretext, of paying a vow in a province.³

Legati municipiorum, —nuntii. *Legati municipiorum* (or *nuntii*) were merely messengers, and did not possess any real diplomatic character.

From a practical point of view we may conveniently make a bipartite classification of the various uses and applications of the word *legatus*;—firstly, as indicating "an envoy despatched by a magistrate, under the advice of the senate, for some object of diplomacy, inquiry, or organisation"; and secondly, as signifying "a person formally attached to a general-in-chief or provincial governor, as lieutenant or staff-officer."⁴ But in view of what is said below relating to the exemption from the local jurisdiction, and having regard to the civil provisions of the *Digest* which in some cases are not clearly

¹ Cic. *Ad Fam.* xii. 21: "C. Anicius . . . negotiorum suorum causam legatus est in Africam, legatione libera." Cf. *Ad Attic.* xv. 11.—Ulpian, in *Dig.* l. 7 (de legationib.), 14: "... qui libera legatione abest, non videtur rei publicae causa abesse, hic enim non publici commodi causa, sed sui abest."

² Cic. *Ad Att.* xv. 11. 4; *De leg.* iii. 8. 18; iii. 3. 9.

³ Cic. *Ad Att.* iv. 2; xv. 8; xv. 11.

⁴ Sir William Smith (ed.), *Dictionary of Greek and Roman Antiquities* (London, 1891), vol. ii. p. 23.

or specifically referred to the one or other, it is well to recollect that from the point of view of Roman constitutional law scarcely any discrimination is made between them.

The right to send ambassadors was conceived both in Greece and in Rome to be a right inherent only in sovereign powers. In Greece, federal States did not in theory possess the right, which could be exercised only by the central authority ; in practice, however, we find that some cities that were, for example, confederates of the Achaean League sent ambassadors of their own to foreign States. The principles of federalism were inevitably antagonistic to the deep-rooted desire of independence and political exclusiveness, so that no systematic schemes of federalism, political or juridical, were ever worked out. Besides, this right was in no sense an absolute right ; it had to be expressly recognized in a treaty on the basis of a bilateral obligation, or, failing this, it was necessary to obtain a special concession from the State consenting to receive representatives. In either case States could regulate the admission of ambassadors, their residence in the city, and their return to their country ; and should there be any infringement—even, in some cases, of a technical character, apart from any of a substantial nature—of such regulations, which were considered to be accepted expressly or implicitly, the envoys could be peremptorily treated as enemies.

Right to send
and receive
ambassadors.
Federal States.

In case of refusal by the competent authorities to receive legations, any treaties at the time subsisting between the States concerned were broken off ; and this rupture might, and usually did, signify preliminary steps to war. Where there was no existing treaty, refusal implied an intention to continue hostile relationships that may already have been commenced, or where hostilities had not yet been begun, it might imply a determination to remain without any regular systematic relations with the other community. Thus in

Effect of
refusal to
receive envoys.

169 B.C. the Romans indicated their intention to discontinue relationships with the Rhodians by refusing to receive their ambassadors. "... *Consulti ab M. Iunio consule patres stantibus in comitio legatis, an locum lautia senatumque darent, nullum hospitale ius in iis servandum censuerunt, egressus e curia consul, cum Rhodii gratulatum se de victoria purgatumque civitatis crimina dicentes venisse petissent, ut senatus sibi daretur, pronuntiat, sociis et amicis et alia comiter atque hospitaliter praestare Romanos et senatum dare consuesse: Rhodios non ita meritos eo bello, ut amicorum sociorum numero habendi sint.*"¹ Again in 161 B.C., when Menyllus was sent by Ptolemy Philometor to plead his cause against his younger brother Physcon, the senate, being in favour of the latter, refused to listen to the envoy, and by a decree ordered the embassy to leave Rome within five days, and cancelled the treaty of alliance with Ptolemy. *"Ἐδοξε τῇ συγκλήτῳ τοὺς περὶ Μένυλλον ἐν πένθ' ἡμέραις ἀποτρέχειν ἐκ τῆς Ῥώμης καὶ τὴν συμμαχίαν ἀναρκεῖν.*"²

In Rome right of legation allied to sovereign capacity.

In Rome, more than in any other ancient community, the strict right of legation was indissolubly associated with the possession of sovereign capacity. In the later epoch, when the Roman constitution was elaborately developed, there was express legislation on this matter.³ Interchange of ambassadors could take place only with a free and independent State. Thus, as Polybius relates,⁴ after Aegina had been taken by the Romans (208 B.C.), those inhabitants who had not effected their escape begged Publius, the pro-consul, to allow them to send ambassadors to cities of their kinsmen in order to obtain

¹ Liv. xlv. 20.

² Polyb. xxxii. 1; cf. Diod. xxxi. 23.

³ *Dig.* l. 7 (de legation.), 2, *pr.*: "*Legatus contra rempublicam, cuius legatus est, per alium a principe quid postulare potest*"; *ibid.* l. 7. 15: "*Is, qui legatione fungitur, libellum sine permissu principis de aliis suis negotiis dare non potest*"; and cf. *Dig.* l. 4 (de muner. et honor.), 18. 12; *Iust. Cod.* x. 63 (de legat.), 1.

⁴ ix. 42.—Cf. A. Thurm, *De Romanorum legationibus ad externas nationes missis* (Lipsiae, 1883), pp. 92 seq.

ransom. The answer of Publius was at first harsh ; the time for sending ambassadors, said he, was when they were their own masters, not when they were slaves or captives, . . . ὅτε ἦσαν αὐτῶν κύριοι, τότε δεῖν διαπρεσβεύεσθαι . . . μὴ νῦν δούλους γεγονότας. The next morning, however, he called the Aeginetans together, and gave them leave to send ambassadors for procuring ransom, since that was the custom of their country . . . ἐπεὶ τοῦτο παρ' αὐτοῖς ἔθος ἐστίν

The right to send implied the right, as well as the obligation, to receive ; and this obligation rested on the sanction of the law of nations. Thus Hannibal, as Livy reports, was reproached for acting in contravention of the *ius gentium* in refusing to receive ambassadors from the allied States (220 B.C.) : "... legatos ab sociis et pro sociis venientes bonus imperator vester in castra non admisit ; ius gentium sustulit."¹ The *ius gentium* laid down that a hearing was not to be lightly denied to envoys,—“Oratorem audire oportere iuris gentium est.”² In case of refusal good cause must be shown. The right to send implied the obligation to receive. Rome often claimed the right ; and sometimes notification to that effect was made beforehand by other peoples as well as by Rome. To advance an inadequate cause or to assume an attitude of arrogance in this respect might provoke war. Livy states that the Veientian war was due to an insolent answer of the Veientian senate in informing the ambassadors, who came to demand restitution, that if they did not speedily quit the city and the territory, they would give them what Lars Tolumnius had given them, whereupon war was declared against the Veientians by the Roman senate (406 B.C.).³ Again, after the conclusion of the alliance with the Lucanians (300 B.C.) fetials were despatched to the Samnites to demand the withdrawal of their troops from Lucanian territory ; and the envoys having been threatened as to their safety

¹ xxi. 10.

² Donatus, Ad prolog. *Heqyrae*, Terent. 1.

³ Liv. iv. 58 : "... Veiens bellum motum ob superbum responsum Veientis senatus, qui legatis repetentibus res, ni facerent propere urbe finibusque, daturos quod Lars Tolumnius dedisset. . . ."

should they venture into Samnium, war was declared by Rome.¹

Cases of
refusal by
Rome.

On some occasions the Roman senate offered an absolute refusal to admit ambassadors, as, for example, in the case of those sent by King Perseus, in view of the fact that war had already been declared against him (171 B.C.);² as also in the case of the Carthaginian envoys, on the ground that the Carthaginian army was in Italy.³ Similarly the Emperor Justinian would not receive the envoys of Totila, on the ground of the frequent violation of faith by the latter; and those of Belisarius were rejected by the Goths for a like reason.⁴ When ambassadors were thus rejected, notice was usually given to them to leave the territory within a certain time; thus, the envoys of Jugurtha were ordered to quit Italy within ten days,—“*Senatus a Bestia consultus est, placeretne legatos Iugurthae recipi moenibus; iique decrevere, . . . uti diebus proximis decem Italia decederent.*”⁵

Ambassadors
sometimes
received by
generals.

Commanders in the field were sometimes authorized by the senate to receive enemy envoys in regard to such matters as were closely connected with the war. “... P. Licinium consulem brevi cum exercitu futurum in Macedonia esse; ad eum, si satisfacere in animo est, mitteret legatos.”⁶ In cases of this kind the transactions of the general, especially in such matters as were of an important character, were subject to ratification by the senate. He was not considered to possess plenary power in negotiations in general with the enemy, apart from express recognition thereof by the senate. When

¹ Liv. x. 12: “... si quod adissent in Samnio concilium, haud inviolatos abituros”; cf. *ibid.* xxxvii. 12.

² Liv. xlii. 36: “Per idem tempus legati ab rege Perseo venerunt. eos in oppidum intromitti non placuit, cum iam bellum regi eorum et Macedonibus et senatus decreset et populus iussisset. in aedem Bellonae in senatum introducti . . .”

³ Cf. Servius, Ad Virg. *Aen.* vii. 168.

⁴ Cf. Grotius, *De jure belli et pacis*, lib. ii. 18. 3.

⁵ Sallust, *Iug.* 28.

⁶ Liv. xlii. 36.

the commander was not sure of his competence, in any particular case, to receive enemy envoys and to negotiate with them, he referred them to Rome, fixing at the same time a term during which the said embassy was to be despatched, and the necessary business completed. An example of this is seen in the action of the praetor T. Aemilius with regard to the Samnites (338 B.C.).¹ Similarly, T. Quinctius Flaminius stipulated in the case of Philip's embassy to Rome, as a result of the congress at Nicaea, 197 B.C., that the mission was to be finished within the two months' truce he had granted for the purpose.²

The commencement and, sometimes, the discontinuance of ambassadorial relationships were usually announced by a herald; as when the leaders of the Libyans in the mercenary war, 238 B.C., sent a herald to Hamilcar to obtain permission for the despatch of an embassy,—*πέμψαντες οὖν κήρυκα καὶ λαβόντες συγχώρημα περὶ πρεσβείας* . . .³ And after the defeat of Antiochus by the Romans (190 B.C.) he sent a messenger to the Scipios to announce that he desired to send envoys to treat on the terms of peace, and that, therefore, a safe-conduct (*ἀσφάλεια*) should be given them, . . . *βούλεσθαι . . . ἐξαποσταλῆναι πρεσβευτὰς τοὺς διαλεχθισομένους ὑπὲρ τῶν ὅλων*.⁴

Herald in commencement and discontinuance of legations.

In this department of international law, as in so many others, it is necessary to distinguish between the practices of Rome in the first period of her history and those of her second period. In the former, conditions usually obtained which were more of the nature of reciprocity, political and juridical. In the latter period, she often sent envoys rather in her supreme capacity than on a

To distinguish practices of Rome in first period and second.

¹ Liv. viii. 2 : "Foedere icto cum domum revertissent, extemplo inde exercitus Romanus deductus annuo stipendio et trium mensum frumento accepto, quod pepigerat consul, ut tempus indutiis daret, quoad legati redissent."

² Polyb. xviii. 10 : Δοὺς γὰρ ἀνοχὰς διμήνους αὐτῷ τὴν μὲν πρεσβείαν τὴν εἰς τὴν Ῥώμην ἐν τούτῳ τῷ χρόνῳ συντελεῖν ἐπέταξε.

³ Polyb. i. 85.

⁴ Polyb. xxi. 16 (13).

footing of equality; and on several occasions repudiated any terms advanced for the admission of ambassadors, as, for instance, in the case of the legation of Q. Caecilius Metellus despatched to Philip and to the Achaeans in 184 B.C.¹

Reception of
ambassadors.
In Greece.

In Greece envoys were received and despatched by the assembly of the people.² They were, as a rule, introduced in the first instance by the proxenoi³ of their respective cities. The *θεωροί*, the envoys on a sacred mission, were received first by the *θεαροδόκοι* (or *θεωροδόκοι*), officials specially appointed for the purpose; the reception itself was termed *θεαροδοκία* or *θεωροδοκία*.⁴ Every member of the assembly or council had the right to make suggestions relative to the instructions given or message brought. Such permission was announced by the magistrates, as Livy states, through the herald, in accordance with the customs of the Greeks.⁵ During the debates arising out of the mission the foreign ambassadors retired, and reappeared at the conclusion. Thus, in 220 B.C. in Sparta, at a time of trouble and dissension, Machatas, an ambassador despatched by the Aetolians, was allowed by the ephors to address a public assembly; and in a long speech urged the people to embrace the alliance with Aetolia. "Upon his retirement there was a long and animated debate between those who supported the Aetolians and advised the adoption of their alliance, and those who took the opposite side."⁶ In Sparta, on the the arrival of ambassadors, they were

In Sparta.

¹ Polyb. xxii. 15; Liv. xxxix. 33.

² Liv. xxxii. 19.

³ See *supra*, p. 153.

⁴ Cf. *Corp. inscrip. Graec.* nos. 1193, 1693, 2670.

⁵ Liv. xxxii. 20: "... postero die advocatur concilium; ubi quum per praeconem, sicut Graecis mos est, suadendi, si quis vellet, potestas a magistratibus facta esset nec quisquam prodiret, diu silentium aliorum alios intuentium fuit."

⁶ Polyb. iv. 34: μεταστάντος δὲ τούτου πολλῆς ἀμφισβήτησεως ἐτύγχανε τὸ πρᾶγμα· τινὲς μὲν γὰρ συνηγόρουν τοῖς Αἰτωλοῖς καὶ συντίθεσθαι πρὸς αὐτοὺς παρήνουν τὴν συμμαχίαν, ἔνιοι δὲ τοῦτοις ἀντέλεγον.

obliged to report themselves immediately to the ephors.¹ In Carthage they were, in the first place, presented to the council, and afterwards brought before the assembly of the people. Thus Polybius relates that some transports under Cn. Octavius having been wrecked in the Bay of Carthage and taken possession of by the Carthaginians in spite of a truce that had been made, 203 B.C., Scipio despatched three envoys (Lucius Sergius, Lucius Baebius, and Lucius Fabius) to go to Carthage to remonstrate; and that on their arrival in Carthage they first obtained an audience of the senate, and then were presented to the popular assembly,—οἱ δὲ παραγενθέντες εἰς τὴν Καρχηδόνα τὸ μὲν πρῶτον εἰς τὴν σύγκλητον, μετὰ δὲ ταῦτα πάλιν ἐπὶ τοὺς πολλοὺς παραχθέντες...² Similarly we find a Rhodian legate setting forth complaints, as to severe practices in the sacking of a city, before an assembly of Aetolians at Heraclea, 207 B.C.³

With regard to Rome,⁴ foreign envoys were obliged to announce their arrival to the senate, through a prior notification to the praetor or *quaestor urbanus* at the temple of Saturn. Plutarch suggests that they gave in their names first of all to the quaestors, because the latter supplied them with the necessary *ξένια* (Lat. *munera*) or *λαύτεια* (Lat. *lautia*).⁵ In this way they obtained permission to be received in audience. Sometimes such permission was granted by other officials. Thus the consul Marius gave the ambassadors of Bocchus, king of Mauretania, leave to proceed to Rome,—“*legatis potestas Romam eundi fit a consule*”;⁶ and the envoys from Carthage and from Philip were notified by the dictator, on the authority of the senate,

¹ *Ibid.*

² Polyb. xv. 1.

³ Polyb. iii. 20, 23; cf. Liv. xxviii. 7.

⁴ Cf. Mommsen, *Röm. Staatsr.* vol. iii. pt. 2, pp. 1148-1158.

⁵ *Quaest. Rom.* 43: Διὰ τί δὲ οἱ πρεσβεύοντες εἰς Ῥώμην ὁποθενοῦν, ἐπὶ τὸν τοῦ Κρόνου ναὺν βαδίζοντες, ἀπογράφονται πρὸς τοὺς ἐπάρχους τοῦ ταμείου.—See *supra*, p. 225, as to *lautia*, etc.

⁶ Sall. *Ing.* 104.

that an audience of the consuls would be granted to them.¹ Until the proper authorization was obtained they had to wait in a place specially appointed for the purpose, as in the case of the ten Locrian envoys, 204 B.C.² If the permission was accorded them there was, it would seem, a solemn introduction by the praetor or by the consul.³ In 183 B.C. we find the *praetor peregrinus* presenting to the senate deputies from Transalpine Gaul;—"introducti in senatum a C. Valerio praetore,"⁴ Valerius having been in the same year elected peregrin praetor.

In the later Republic.

In the later days of the Republic, as a rule, oral messages brought by envoys who were received in Rome were delivered to the consuls in the presence of the senate, which took cognizance of the affairs in question,—... τῶν παραγενομένων εἰς Ῥώμην πρεσβειῶν, ὡς δεόν ἐστιν ἐκάστοις χρῆσθαι, καὶ ὡς δεόν ἀποκριθῆναι, πάντα ταῦτα χειρίζεται διὰ τῆς συγκλήτου.⁵ Written communications were addressed to the magistrates who were then entitled to preside over the proceedings relating thereto in the senate. Thus foreign envoys were at this epoch regarded primarily as envoys to the senate, and even as guests of the senate,—"... vorzugsweise als Sendboten an den Senat und also auch als Gäste des Senats."⁶

Foreign envoys failing to get permission liable to be treated as spies.

If, however, the ambassadors did not duly obtain the necessary permission to be received in audience, they were liable to be considered as spies (*speculatores*), and treated accordingly; or, at the least, they might be entirely disregarded in respect of their diplomatic capacity. Thus, Illyrian legates having arrived in Rome,

¹ Liv. xxx. 40 : "legatis Carthaginiensium et Philippi regis—nam ii quoque venerant—petentibus, ut senatus sibi daretur responsum iussu patrum a dictatore est, consules novos eis senatum daturos esse." Cf. Liv. xlv. 20 : "... cum Rhodii, gratulatum se de victoria purgatumque civitatis crimina, dicentes venisse, petiissent, ut senatus sibi daretur."

² Liv. xxix. 16; cf. Plin. *Hist. nat.* xxxiv. 24.

³ Liv. xlii. 6; xliii. 6.

⁴ Liv. xxxix. 54.

⁵ Polyb. vi. 13.

⁶ Mommsen, *Röm. Staatsr.* vol. iii. pt. 2, p. 1149.

174 B.C., and having failed to report themselves and declare their diplomatic character in the customary manner, were subsequently denied an audience by the senate. It was not thought fit, says Livy, to give them any answer as delegates, on the ground that they had not applied for an audience of the senate,—“*responsum tamquam legatis, ut qui adire senatum non postulassent, dari non placuit.*”¹ Similarly when Carthaginian envoys had arrived to treat for peace, 205 B.C., M. Valerius Laevinus endeavoured to convince the senate that they were really spies, and not ambassadors, and urged that they ought to be ordered to depart from Italy, and that guards should accompany them to their very ships,—“... *speculatores non legatos venisse arguebat, iubendosque Italia excedere et custodes cum iis usque ad naves mittendos.*...”²

When the negotiations were completed, or for any reason broken off, the foreign envoys were obliged to leave Rome or Italy, as the case may be, within a given time. Thus ambassadors from Perseus of Macedon (171 B.C.) were ordered to leave Rome immediately, and Italy within ten days; and they were guarded till the moment of their embarkation.³ Similarly, Aetolian ambassadors were notified to quit Italian territory within fifteen days.⁴

A Roman law of 166 B.C., forbidding the kings of allied States to come in person to Rome, operated as a great inducement to foreign States to establish and develop diplomatic relationships through the medium of ambassadors.⁵ But at times the senate

When negotiations completed or broken off.

Kings of allied States forbidden to come to Rome in person.

¹ Liv. xlii. 26.

² Liv. xxx. 23.

³ Liv. xlii. 36: “*Ita dimissis, P. Licinio consuli mandatum, intra xi diem iuberet eos Italia excedere et Sp. Carvilius mitteret qui, donec navem, conscendissent, custodiret.*”

⁴ Liv. xxxvii. 1.

⁵ Liv. Ep. xvi.: “*Eumenes rex Romam venit... ne aut hostis iudicatus videretur, si exclusus esset, aut liberatus crimine, si admitteretur, in commune lex lata est, ne cui regi Romam venire liceret.*” —Cf. Polyb. xxx. 20.

admitted exceptions to this rule, probably, as Mommsen observes, in virtue of its power to grant exemptions from general laws,—“vermuthlich durch Entbindung von dem allgemeinen Gesetz.”¹ Thus, shortly afterwards (164 B.C.), both Ptolemaeus Philometor and Ptolemaeus Euergetes of Egypt were received in Rome.²

How envoys
of friendly
States were
received.
'Locus.'

'Lautia.'

'Aedes
liberae.'

General
hospitality.

'Comitas
gentium.'
Admitted to
best Roman
families.

Honours at
public feasts.

Ambassadors of friendly States were received by the Romans with great respect, and obtained in the city furnished houses, 'hospitia publica'³ ('locus'⁴ or 'loca'⁵), free quarters—κατάλυμα, as Polybius terms it,⁶ board and gifts of various kinds, παροχή ('lautia').⁷ Livy points out that they and their attendants were installed in the city in an 'aedes liberae,' that is, a house not inhabited by any other person,—“ades quae ipsum comitesque eius benigne acciperent, conductae.”⁸ The city to which they were accredited bestowed hospitality, and all the privileges incidental thereto. In the observance of usages of politeness and courtesy towards them, as being the representatives of their governments, we see the beginnings of the important principle of 'comitas gentium,' which was to exert in succeeding ages such a profound influence. They were admitted to the households of the most aristocratic Roman families, and sometimes were on terms of great intimacy with them. On the occasion of public feasts certain additional honours were conferred on them. Thus, as public guests also, they were then treated like

¹ *Röm. Staatsr.* p. 1150, n. 1.

² Polyb. xxi. 18; Val. Max. v. 1. 1.

³ Liv. xlv. 22; Val. Max. v. 1. 1.

⁴ Liv. xxviii. 39.

⁵ Liv. xlii. 26.

⁶ xxxii. 19.—Cf. Diod. Sic. xiv. 93, where he speaks of δημόσιον κατάλυμα.

⁷ Polyb. xxxii. 19.—Cf. *supra*, pp. 225 *seq.*, as to the treatment of public guests; and see V. Ferrenbach, *Die Amici Populi Romani republikanischer Zeit* (Strassburg, 1895), pp. 65 *seq.*

⁸ Liv. xlv. 44; cf. Liv. xlii. 19; Val. Max. v. 1. 1.

senators, and therefore had access to the senaculum.¹ Under the principate similar honours were bestowed on the ambassadors of kings or of independent communities.² Occasionally foreign ambassadors also courted public favour in other directions. Thus the Athenian envoys Carneades, Diogenes, and Critolaus, despatched to Rome in 155 B.C. for the purpose of deprecating the fine of five hundred talents which had been imposed on their city for the destruction of Oropus, delivered there public lectures in philosophy.

When the foreign envoys were introduced to the senate, they delivered their message, and were liable to be questioned thereon by the senators individually. Foreign envoys liable to be questioned by the senators. "Cum more tradito patribus potestatem interrogandi, si quis quid vellet..."³ Pending the deliberations that ensued, the ambassadors (as in the case of Greece) retired. Varro says they were conducted to a platform, called the Graecostasis, which was outside the Curia.⁴ When the reply of the senate was ready, either they were recalled and received it from the presiding senator in person, or it was conveyed to them by a magistrate specially appointed for the purpose.⁵

Ambassadors of enemy States, however, were usually bound to get the previous permission of the nearest Roman general to proceed to Rome; otherwise they were liable to be treated as enemies.⁶ They were not received in the city, but outside the Pomerium (the space Ambassadors of enemy States—previous permission.

¹ Varro, *De ling. Lat.* v. 155: "Locus substructus, ubi nationum consistent legati qui ad senatum essent missi."—Cf. Justin. xliii. 5. 10: "...Immunitas illis [*i.e.* to the Massilians] decreta et locus spectaculorum in senatu datus."

² Sueton. *Claud.* 21: "Germanorum legatis in orchestra sedere permisit."

³ Liv. xxx. 22.

⁴ *De ling. Lat.* v. 155.—Cf. *supra*, n. 1.

⁵ Liv. xlv. 20.

⁶ Thus Livy, xxxvii. 49, says in reference to the Aetolian ambassadors, 191 B.C.: "...Denuntiaturque si qua deinde legatio ex Aetolis nisi permissu imperatoris qui eam provinciam obtineret et cum legato Romano venisset Romam, pro hostibus omnes futuros."

Received
outside the
city.

originally along the city-wall within and without which was left vacant and regarded as sacred). "Legati si quando incogniti venire nuntiarentur, primo quid vellent ab exploratoribus requirebatur, post ad eos egrediebantur magistratus minores et tunc demum senatus extra pomeria postulata noscebat et ita, si visum fuisset, admittebantur."¹ They were, as Servius here states, first visited by the minor magistrates—probably the quaestors—before they obtained an audience of the senate. The envoys of the Macedonians, when the latter were at war with Rome, were conducted outside the city to a 'villa publica' in the Campus Martius, and were there supplied with the customary requisites, which amounted practically to the same as those allowed to ambassadors of friendly countries.²

Treatment
generally—
distinction
between
friendly and
hostile
legations.

In regard to treatment generally a certain distinction was often made between legations that came to establish amicable relationships and those that came to effect a rupture of negotiations. In the case of the latter we find that they were forbidden to enter the city, they did not receive the full *hospitium* in the villa publica, and obtained an audience of the senate only in the temple of Bellona or of Apollo,—"...quibus vetitis ingredi urbem, hospitium in villa publica, senatus ad aedem Bellonae datus est."³ The Rhodian envoys in 167 B.C., complained that they were treated almost like enemies, that they were ordered to remain outside the city, and that the arrangements and conditions of the inns allotted to them were an insult to their office and position.⁴ In this respect, however, reciprocal treatment

¹ Servius, *Ad Aen.* vii. 168.

² Liv. xxxiii. 24: "Macedones deducti extra urbem in villam publicam; ibique iis locus et lautia praebita; et ad aedem Bellonae senatus datus."

³ Liv. xxx. 21.—And cf. the last note in the case of the Macedonian ambassadors.

⁴ Liv. xlv. 22: "... Ex sordido deversorio, vix mercede recepti, ac prope hostium more extra urbem manere iussi, in hoc squalore venimus..."

obtained. Roman envoys despatched to foreign States, with which amicable relationships had not been established, were liable to receive the same brusque treatment. Thus the Roman ambassadors sent to the Dalmatians reported that they refused to grant them an audience, that they said they had nothing in common with the Romans, and that they refused to supply the ordinary necessities incidental to *hospitium*.¹ On other occasions Roman envoys were made to wait a long time before they obtained an audience ; as, for example, in the case of a legion despatched to the King of Macedon,—“*legati Romani . . . cum ad regem pervenissent, per multos dies conveniendi eius potestatem non factam,*”—and only after this long delay were they solemnly introduced to the king. At times, indeed, ambassadors from Rome failed to obtain an audience altogether, as, for example, those sent to Perseus, 173 B.C. “*Principio huius anni legati, qui in Aetoliam et Macedoniam missi sunt, renunciarunt, sibi conveniendi regis Persei potestatem non factam.*”²

Greek and Roman ambassadors were employed for a large variety of purposes.³ Some of these were, in time of peace, as follows : (1) the conclusion of treaties of friendship, alliance, commerce, etc. ; (2) mediation ; (3) appeal for help ; (4) conveyance of grateful acknowledgments and delivery of gifts for services rendered or for good disposition towards the State ; (5) effecting a delivery of fugitives ; (6) conveyance of messages for the adjustment of sacred affairs. Still more important were their functions in time of war, as, for example : (1) the conclusion of peace and negotiation as to terms ; (2) delivery of prisoners, demanded or offered ; (3)

For what
purpose
despatched.
In time of
peace.

In time of war.

¹ Polyb. xxiii. 19 : . . . ὥστε οὐδὲ λόγον ἐπιδέχοντο καθόλου παρ' αὐτῶν, λέγοντες, οὐδὲν αὐτοῖς εἶναι καὶ Ῥωμαίοις κοινόν. πρὸς δὲ τοῦτοις διεσάφουν, μὴ κατάλυμα δοθῆναι σφίσι, μήτε παροχὴν.

² Liv. xlii. 2.—Cf. Liv. iv. 52.

³ See *supra*, pp. 304 *seq.*, as to the different names given to envoys in virtue of their special functions.—Cf. Thurm, *De Rom. leg.* pp. 38-72.

making arrangements as to the burial of those fallen in the war; (4) demand or offer, as the case may be, of capitulation; (5) the adjustment of other relationships arising in the course of the war, or out of it, between the belligerent States.

Number of
envoys sent.

The number of ambassadors sent varied from time to time according to the importance and gravity of the matter in question. In the case of Rome, when fetials were employed for demanding redress of grievances, or for declaring war, the number varied, five or four being frequent, three or two rarer. In missions other than these, there were, in earlier times, sometimes ten envoys, sometimes five, or three. Ten were generally sent to assist the Roman commanders in proceedings relating to the work of pacification. This was the usual number after the second Punic war.¹ A number less than three was very rarely found.

Powers and
instructions.

σύμβολα—
credentials.

The powers and instructions of ambassadors were sometimes consigned to writing, sometimes delivered to them merely in an oral form. In Greece their credentials, commonly designated σύμβολα (often corresponding to the Roman 'tesserae hospitales'), were specifically mentioned in decrees. Thus in an extant Athenian decree (B.C. 372-360) engraved on a marble stele, which was found on the Acropolis, and is now preserved at Oxford, we find the σύμβολα mentioned in connection with the conferring of honours on Straton, King of Sidon,—*ποιησάσθω δὲ καὶ σύμβολα ἢ βουλὴ πρὸς τὸν βασιλέα*. . . .² A similar use of the word is found in

¹ Liv. xxxiii. 24; xxvii. 55; xlv. 17.

² *Corp. inscrip. Att.* ii. 86; *Corp. inscrip. Graec.* 87; Michel, *Recueil*, 93; Hicks, *Gr. Inscript.* no. 111, ll. 18 seq.:

.....π-
οιησάσθω δὲ καὶ σύμβολα ἢ βουλὴ πρ-
ὸς τὸν βασιλέα τὸν Σιδωνίων ὅπως
ἂν ὁ δῆμος ὁ Ἀθηναίων εἰδῇ ἕάν τι
πέμπῃ ὁ Σιδωνίων βασιλεὺς δεύ-
ενος τῆς πόλεως, καὶ ὁ βασιλεὺς ὁ Σ-
ιδωνίων εἰδῇ ὅταν πέμπῃ τινὰ ὥ-
ς αὐτὸν ὁ δῆμος ὁ Ἀθηναίων.

an oration of Lysias delivered about the same period (387 B.C.).¹ This application of the term *σύμβολον* appears to have been overlooked by the majority of lexicographers.

In Rome, though we find several examples of envoys' mandates being merely verbal,² they were generally in written form. The same practice obtained also in other countries. Livy relates that when Perseus, after the conference with the Romans (173 B.C.) had retired into Macedon, he despatched ambassadors to Rome to resume the negotiations for peace commenced with Marcius, and gave them letters to be delivered at Byzantium and Rhodes.³ And so Suetonius says that

after the tribunitian authority was conferred upon Tiberius a special commission was also entrusted to him to settle the affairs of Germany (A.D. 4).⁴ There are also cases where letters of credit were added to the full powers conferred. On certain occasions, a document containing a *senatusconsult* took the place of the ordinary letters of credit. Thus Polybius relates that ten Roman envoys arrived in Corinth (B.C. 196), to effect the settlement of Greece, and brought with them the decree of the senate relative to the peace with Philip;⁵ and this decree at the same time determined their competence in their mission. Roman ambassadors were obliged to adhere strictly to the terms of their

Verbal
mandates.

Senatorial
decree instead
of letters of
credit.

Powers
specified.

¹ Lysias, *De bonis Aristophanis*, 25: Δῆμος γὰρ ὁ Πυριλάμπους, τριηραρχῶν εἰς Κύπρον, ἐδεήθη μου προσελθεῖν αὐτῷ, λέγων ὅτι ἔλαβε σύμβολον παρὰ βασιλέως τοῦ μεγάλου φιάλην χρυσήν. . .

² Cf. Cic. *Ad Att.* i. 12; Liv. xxiii. 33.

³ Liv. xlii. 46: "Perseus, cum ab conloquio Romanorum in Macedoniam recepisset sese, legatos Romam de incohatis cum Marcio condicionibus pacis misit; et Byzantium et Rhodum litteras legatis ferendas dedit."

⁴ *Tiber.* 16: "... data rursus potestas tribunicia in quinquennium, delegatus pacandae Germaniae status..."—Cf. Liv. xxvii. 51; xxxiii. 11; xlv. 25; Tacit. *Ann.* i. 57.

⁵ Polyb. xviii. 44: "... ἦκον ἐκ τῆς Ῥώμης οἱ δέκα δι' ὧν ἐμελλε χειρίζεσθαι τὰ κατὰ τοὺς Ἕλληνας κομίζοντες τὸ τῆς συγκλήτου δόγμα τὸ περὶ τῆς πρὸς Φίλιππον εἰρήνης.

'Mandata libera'—full powers.

commission, the extent of which was, as a rule, clearly marked out for them ; though in certain urgent cases, where circumstances made it difficult or impossible to circumscribe their authority in this manner, unlimited full powers of negotiation—'mandata libera'—were conferred upon them. Thus, in connection with the negotiations commenced with the States of Asia (191 B.C.) ten ambassadors (or commissioners) were appointed by the senate with full powers—'libera mandata'—to decide as they thought necessary ; so that they acted in the capacity of plenipotentiaries. "His, quae praesentis disceptationis essent, libera mandata ; de summa rerum senatus constituit."¹

Who chosen as diplomatic envoys.

In Rhodes—the admiral.

Proxenoï.

Minimum age fixed.

Ambassadors were chosen from amongst the most distinguished and honoured citizens. Sometimes those who already had high civil or military appointments were nominated for legations, as an additional mark of honour and in recognition of their able services. Thus we find a Rhodian admiral coming to Rome as an ambassador. A speech of the Rhodian Astymedes having incensed the Romans (167 B.C.), the Rhodians, threatened with war, despatched to Rome Theaetetus as navarch and head of an embassy—*προσβευτήν ἄμα καὶ ναύαρχον*—to propitiate the senate.² In Greece *proxenoï* who had acquired adequate experience and knowledge of foreign affairs were frequently sent on missions to countries which they had previously represented or whose interests they had protected in their official or quasi-official capacity.³ In some Hellenic communities wide experience of affairs was so much insisted on as an essential qualification for taking part in diplomatic negotiations that a minimum age was fixed for ambassadorial candidates. Thus there was a law of the Chalcidians that no individual under the age of fifty could officiate as an ambassador (or as any magis-

¹ Liv. xxxvii. 55, 56. Cf. Liv. xxxiii. 24.

² Polyb. xxx. 5.

³ See *supra*, pp. 153 seq.

trate)—νόμος δὲ ἦν Χαλκιδεῦσι μὴ ἄρξαι μηδὲ πρεσβεῦσαι νεώτερον ἐτῶν πενήκοντα.¹

In Rome at the time of the Kings envoys were chosen from the college of fetials in matters relating to the declaration of war, to the conclusion of treaties, and to extradition (*deditio*); but outside these questions other distinguished individuals could be appointed. The Rhodians, as Polybius relates, considered it grossly disrespectful on the part of the Roman commander, Gaius Lucretius, for sending to them as an envoy one Socrates, an athletic trainer (ἀλείπτης); they pointed out that it was not customary for the Romans to employ messengers of this character; for, on the contrary, they were inclined to act with elaborate care and dignity in the despatch of missives,—... οὐκ εἰωθότων τοῦτο ποιεῖν Ῥωμαίων, ἀλλὰ καὶ λίαν μετὰ πολλῆς σπουδῆς καὶ προστασίας διαπεμπομένων ὑπὲρ τῶν τοιούτων.² Such conduct on the part of the Romans (or other ancient peoples) was exceptional; the usual practice was to employ only persons of birth, distinction, and ripe age. Forty years was generally the minimum age. Ulpian says in the *Digest* that twenty-five years was the lowest age for any public official.³

Under the
Roman Kings
—fetials
despatched.

Minimum age

Under the Republic, when the religious element in public life was declining, the senate selected ambassadors from among its number.⁴ Thus, in 205 B.C. ten senators were appointed envoys by the

Under the
Republic—
senators.

¹ Heraclides (Ponticus), περὶ πολιτειῶν (*De rebus publicis*), c. 31; (in *Historic. Graec. fragmenta*, ed. C. Müller, t. ii. p. 222).

² Polyb. xxvii. 7.

³ *Dig.* l. 4 (de muner. et honor.), 8: "Ad rempublicam administrandam ante vicesimum-quintum annum, vel ad munera quae non patrimonii sunt, vel honores, admitti minores non oportet..."

⁴ Cf. Mommsen, *Röm. Staatsr.* vol. iii. pt. ii. p. 1158: "Aber in Folge der Zurückdrängung des sacralen Elements im Staatswesen, welche einen der wichtigsten Gegensätze der republikanischen Entwicklung gegenüber dem königlichen Rom bildet, bleibt den Fetialen in historischer Zeit nur das religiöse Ceremoniell und werden mit der eigentlichen Verhandlung anfangs vorzugsweise, bald ausschliesslich Mitglieder des Senats beauftragt."

In later
Republic—
often chosen by
lot.

consuls,—“... consules decem legatos, quos iis videretur, ex senatu legere.”¹ And after Philip's defeat in Thessaly, 198 B.C., by Titus Quinctius, it was decreed, says Livy, that in accordance with ancient practice, ten ambassadors should be appointed, and that, in council with them, the general should grant terms of peace to Philip.² Similarly, ten commissioners of high rank—undoubtedly senators—were despatched, 196 B.C., to arrange the settlement of Greece in conjunction with Flamininus.³ In the later period of the Republic there was a departure from the earlier custom in that the election of envoys appears to have been determined by lot (*sortitio*) from the various senatorial orders, such as *consulares*, *praetorii*, etc. Cicero, writing in 60 B.C., gives an account of this procedure in the case of the appointment of *legati* to proceed to Gaul;⁴ and Tacitus writes, indeed, as though this method had once been common,—“*vetera exempla, quae sortem legationibus posuissent.*”⁵

Members of
the equestrian
order.

In certain cases of urgency, or through the insufficiency of senators (as, for example, in 413 B.C.), members of the equestrian order were added to the number of diplomatic agents to co-operate with or take the place of the senators,—“... consules... *coacti sunt binos equites adicere.*”⁶ As in the case of Greece, such persons as had satisfactorily fulfilled other public duties in foreign States were frequently sent to these States on diplomatic missions. Thus, in connection with the appointment of the ten ambassadors to discuss terms of peace with Philip, a clause was added in the decree of the senate that Publius Sulpicius and Publius Villius, who in their

Able ex-
officials.

¹ Liv. xxix. 20.

² Liv. xxxiii. 24: “Decem legati more maiorum, quorum ex consilio T. Quinctius imperator leges pacis Philippo daret, decreti.”

³ Polyb. xviii. 42: ... ἡ σύγκλητος ἄνδρας δέκα καταστήσασα τῶν ἐπιφανῶν ἐξέπεμπε τοὺς χειριούντας...

⁴ *Ad Att.* i. 19. 2-3.

⁵ *Hist.* iv. 6. 8.

⁶ Liv. iv. 52.—Cf. Liv. xxxi. 8.

consulships had held the province of Macedonia, should be included in the number.¹ Likewise ex-magistrates, who had had other public experience, were chosen. The embassy which negotiated terms of peace with Antiochus in 189 B.C. consisted of three *consulares*, four *praetoriani*, and three *quaestorii*.² In important legations it was a general practice to include at least one *consularis*; if there were more than one, then the senior *consularis* was the head of the embassy, 'princeps legationis.'³

In the earlier history of Rome, when religion played a more prominent part in public life and was more closely in touch with her jurisprudence, members of the college of *fetials* (as has already been observed above) were sent as diplomatic envoys. The first case mentioned by Livy of individuals chosen outside the college occurred in 456 B.C., when three envoys were despatched to the Aequi to complain of injuries and demand reparation,—“questum iniurias et ex foedere res repetitum.”⁴ Henceforth, *legati* seem to have been reserved for the functions of negotiation and diplomacy generally, whilst the *fetials* themselves took part in the actual declaration of war and conclusion of peace. It is in this sense that Varro distinguishes between the offices of the *fetials*, and those of the *legati* or *oratores*.⁵

Both in Greece and in Rome ambassadors were accompanied by suites,—*ἀκόλουθοι*. Thus Thucydides speaks of negotiations in which heralds took part (that is, of course, in the preliminary proceedings), and plenipotentiaries accompanied by their suites—*κήρυκι δὲ καὶ πρεσβείᾳ καὶ ἀκολούθοις*.⁶ Cicero calls these *ἀκόλουθοι*,

¹ Liv. xxxiii. 24.

² Liv. xxxvii. 55.

³ Cf. Sall. *Iug.* 16.

⁴ Liv. iii. 25.

⁵ Varro, ap. Nonium, p. 529: “... priusquam indicerent bellum iis a quibus iniurias factas sciebant *fetiales*, *legatos* res repetitum mittebant quattuor, quos *oratores* vocabant.”

⁶ Thuc. iv. 118.

Asseclae. *asseclae* (or *asseculae*).¹ In an epigraphic document we find also the secretary of an ambassador mentioned.²

Comites. In Roman embassies there were attachés, *comites*, *legati* (in the narrower sense of this word), as well as the ordinary suite. Thus, in the *Digest* 'comites' are, in regard to the privilege of inviolability, specified along with the 'oratores' and 'legati': "item quod ad legatos, oratores, comitesve attinebit, si quis eorum quem pulsasse et sive iniuriam fecisse arguetur."³ And Livy, describing the solemnities incidental to the conclusion of a treaty, refers to the formula employed by a fetial on his appointment as a delegate of the Roman people,—this formula including a reference to the sacred vessels of the appointed envoy and to his attachés or attendants: "Facisne me tu regium nuntium populi Romani Quiritium, vasa comitesque meos?"⁴ The same historian also mentions elsewhere the 'comites legatorum' of a foreign State.⁵ These 'comites' were also appointed by the Government.

The suite attached to Roman embassies comprised a larger number of individuals than that of modern legations. This was due partly to the difficulties of the journey itself, necessitating more work and attendance, and partly to the practice on a much larger scale of ceremonies and formalities in the actual fulfilment of the particular mission concerned. Like the plenipotentiaries and attachés, the minor members of the suite bore a public character.⁶

Rights and
duties of
ambassadors.

Everywhere in antiquity ambassadors were considered inviolable. Even among primitive races the persons of envoys are deemed to be sacred.⁷ It is frequently stated by the Greek historians and other writers that heralds, ambassadors and their suites are sacrosanct in all

Inviolability.

¹ *In Verr.* ii. 1. 25, where Cicero speaks of 'legatorum asseclae.'

² *Corp. inscrip. Graec.* no. 1837, in addendis.

³ *Dig.* xlviii. 6 (de vi publica), 7; cf. *ibid.* xlviii. 11 (de leg. Jul. repet.), 5.

⁴ *Liv.* i. 24.

⁵ *Liv.* i. 30; xlii. 19.

⁶ *Liv.* xxvii. 51.

⁷ See *supra*, p. 303.

matters regarding their office, and in the execution of their duties. They enjoyed liberty to go anywhere, whether by land or by sea, in all proceedings concerning peace and justice. Thus in the truce between the Athenians and the Lacedaemonians, according to Thucydides, the fifth clause is to the effect that there shall be a safe-conduct both by land and sea for a herald, and envoys, and as many attendants as may be agreed upon, passing to and fro between Peloponnesus and Athens to arrange about the termination of the war and about the arbitration of matters in dispute. *Κήρυκι δὲ καὶ πρεσβεῖα καὶ ἀκολούθοις ὅποσους ἂν δοκῇ, περὶ καταλύσεως τοῦ πολέμου καὶ δικῶν ἐς Πελοπόννησον καὶ Ἀθῆνας ἐλπίσι καὶ ἀπιούσι, καὶ κατὰ γῆν καὶ θάλασσαν.*¹ Four centuries later Strabo, speaking of the perfidy of the Persians, similarly emphasizes that it is unlawful to interfere in any way with ambassadors in the exercise of their duties.²

Herodotus gives a striking account of the remorse and expiation of the Spartans for having maltreated the Persian envoys of Darius.³ The latter having despatched heralds to Athens and Sparta 'to demand earth and water,' the Athenians threw them into the barathrum and the Spartans into a well, telling them to carry earth and water to their king from those places. Subsequently, however, two Spartan nobles offered their lives as an atonement to Xerxes for the violence done to the envoys of Darius. But Xerxes replied that he would not act like the Lacedaemonians, who, by killing the heralds, had broken the common laws of mankind; and, as he blamed such conduct in them, he would never be guilty of it himself.⁴ This shows a clear recognition of

Maltreatment
of envoys to be
expiated.

¹ Thuc. iv. 118.

² xvii. 19 : καὶ τοὺς Πέρσας δὲ κακῶς ἡγεῖσθαι τοῖς πρέσβεσι τὰς ὁδοὺς κύκλῳ καὶ διὰ δυσκόλων.

³ Herodot. vi. 48.

⁴ Herodot. vii. 136 : . . . οὐκ ἔφη ὁμοίως ἔσθαι Λακεδαιμονίοισι· ἐκείνους μὲν γὰρ συγχέαι τὰ πάντων ἀνθρώπων νόμιμα, ἀποκτείναντας κήρυκας, αὐτὸς δὲ τὰ ἐκείνοισι ἐπιπλήσσει, ταῦτα οὐ ποιεῖν . . .

an obligation, sanctioned by religion and law alike, even towards those who were considered barbarians and outside the pale.¹

Not amenable
to the local
jurisdiction.

There are, indeed, very few instances recorded of violence offered to the persons of ambassadors, even in case of offences committed by them in the territory of the foreign State to which they were accredited. For it was an established rule that the representatives of foreign sovereigns and communities were not amenable to the local jurisdiction, but that they were triable only by their national tribunals. It is related by Cornelius Nepos that Pelopidas and Ismenias, Theban ambassadors accredited to Alexander, tyrant of Pherae in Thessaly (366 B.C.), having been suspected of intrigues against the independence of the Thessalians, were accordingly arrested and thrown into prison. Though the evidence against Pelopidas pointed to his guilt, yet Thebes declared war as a reply to this outrage, which constituted an infringement of the law of nations.²

Envoy—
personality of
the State.

Precedence.

In Rome the ambassador was recognized as, in a certain sense, a personification of the sovereignty and majesty of the State he represented. When the Roman ambassadors were senators, there was no question of precedence, all being regarded as of equal rank in virtue of their senatorial dignity. Suetonius relates that the Emperor Galba assumed the name of 'legatus': "consultatusque imperator, legatum se senatus ac populi Romani professus est."³ Of Popilius, a Roman envoy, Cicero says he bore with him, as it were, the personality of the senate, the authority of the republic,—"*Senatus faciem secum attulerat, auctoritatem reipublicae.*"⁴ From the earliest times the ambassador was looked upon as the personal representative of the king, as well as of the

¹ The illegal treatment of the heralds is also referred to by Polybius, ix. 39; Pausanias, iii. 12. 6; and Stobaeus, vii. 70.

² Corn. Nep. *Pelop.* 5: "Cum Thessaliam in potestatem Thebanorum cuperet redigere, legationisque iure satis tectum se arbitraretur, quod apud omnes gentes sanctum esse consuesset . . ."

³ Sueton. *Galba*, 10.

⁴ *Philipp.* viii. 8.

people.¹ Hence any offence against an envoy was an offence against the State, against the sovereign Power.

"... Item quod ad legatos oratores comitesve attinebit, si quis eorum pulsasse et sive iniuriam fecisse arguetur."²

Unless due reparation was made, an offence of this kind furnished a just ground for declaring war. If during the existence of an armistice between two States previously at war any offence should be committed by one State against the ambassadors of the other, it necessarily entailed a discontinuance of the armistice. Thus in B.C. 202 a treacherous attempt made on the lives of the Roman envoys who had been sent to Carthage to remonstrate on the conduct of some Carthaginians was, says Polybius, a signal for the immediate resumption of war with a fiercer and more determined spirit.³

Offence against
ambassadors
—ground for
war.

Any injury to envoys or heralds was considered a deliberate infraction of the *ius gentium*.⁴ All ancient writers are unanimous on this matter. Some relatives of Tatius, the king of the Sabines and the colleague of Romulus, having committed a gross outrage on the envoys of the Laurentes, the latter commenced proceedings 'iure gentium.'⁵ Dionysius says that not only from Lavinium but also from other States ambassadors arrived, who denounced this infringement of the law of nations, and threatened war if due satisfaction were not offered. Μετὰ τοῦτ' ἔκ τε Λαβινίου πρέσβεις ἀφικόμενοι καὶ ἔξ ἄλλων πόλεων συχνῶν κατηγοροῦν τῆς παρανομίας, καὶ πόλεμον παρήγγελλον, εἰ μὴ τεύξονται τῆς δίκης.⁶ Tatius was afterwards killed in a tumult at Lavinium,—whereupon Livy observes that he suffered the punishment which was due to his relatives,—"illorum poenam in se

Sanction of the
ius gentium.

¹ Cf. Liv. i. 24 (previously referred to): "Rex, facisne me tu regium nuntium populi Romani Quiritium?"

² Dig. xlviii. 6 (ad legem Iuliam de vi publica), 7.—Cf. Just. Inst. iv. 18 (de pub. iudic.), 8.

³ Polyb. xv. 2.

⁴ Cf. Liv. i. 14; ii. 4; iv. 17, 19, 32; vi. 19; ix. 10; xxi. 25; xxxix. 25.

⁵ Liv. i. 14.

⁶ Dion. Hal. ii. 51.

vertit.”¹ Romulus did not declare war ; but in order that the offence against the ambassadors and the murder of the king might be expiated, the treaty was renewed between the cities of Rome and Lavinium (c. 747 B.C.).

Consensus as to
inviolability.

Amongst the many other pronouncements of the Roman writers as to the inviolability of diplomatic agents, the following may be referred to : “Annius, tanquam victor armis Capitolium cepisset, non legatus, iure gentium tutus . . .”² “Legatis, qui iure gentium sancti sint . . .”³ “Sacrum etiam in exteras gentes legatorum ius et fas.”⁴ “Cum legationis iure se tutum arbitraretur, quod apud omnes gentes sanctum esse consuesset.”⁵ “Violavit legationes, rupto gentium iure.”⁶

Privilege of
attachés.

The same privilege was extended to the attachés (*comites*) of ambassadors,⁷ but probably not so to their suite and family. Correspondence and all things essential to the regular performance of their duties were likewise considered inviolable. In the earlier times the various accessories incidental to legations were referred to specifically on the appointment and despatch of the envoy,—such appointment practically taking the form of a contractual transaction. Thus the customary formula uttered by the nominee was : “Rex, facisne me tu regium nuntium populi Romani Quiritium ? Vasa comitesque meos ?”⁸

The privilege
extended
equally to
enemy envoys.

Enemy envoys were just as inviolable as those of a friendly State. Thus Cicero says : “Legatorum ius divino humanoque vallatum praesidio, cuius tam sanctum et venerabile nomen esse debet, ut non modo inter sociorum iura, sed et hostium tela incolume versetur” ;⁹ and Tacitus : “Hostium ius, sacra legationis et fas gentium.”¹⁰ Further there is found a specific provision

¹ Liv. i. 14.

² Liv. viii. 5.

³ Liv. xxxix. 25.

⁴ Tacit. *Hist.* iii. 80.

⁵ (Previously referred to) Corn. Nep. *Pelop.* 5.

⁶ Seneca, *De ira*, iii. 2.

⁷ Cf. *supra*, p. 328.

⁸ Liv. i. 24.

⁹ *In Verr.* iii.—Cf. *In Verr.* i. 33 : “Nonne legati inter hostes incolumes esse debent ?”

¹⁰ *Ann.* i. 42.

to this effect in the *Digest*: "Si quis legatum hostium pulsasset, contra ius gentium id commissum esse existimatur, quia sancti habentur legati."¹

The principle was, of course, equally applicable in the case of ambassadors remaining within the territory of a foreign State if war should break out between the latter and their own country. Thus Ulpian says in the *Digest* that, in pursuance of the law of nations, the envoys of a community against which war has been declared were no less protected,—"... si cum legati apud nos essent gentis alicuius, bellum cum eis indictum sit? responsum est, liberos esse manere; id enim iuri gentium conveniens esse."²

During the second Punic war, Scipio's envoys had been subjected to ill-treatment at the hands of the Carthaginians,—those violators of alliances—'Poeni foedifragi'—as Cicero called them.³ But when a Carthaginian legation fell into the power of the consul, he deemed it unlawful to adopt against them measures of reprisal or retaliation, and consequently sent them back safe to Carthage.⁴

Scipio's respect of the privilege during the second Punic war.

Strictly speaking, the privilege of inviolability was valid only for the Government to which the legation was accredited, and not necessarily—at least, in its full extent—to third States. But the Romans held such obligation binding on even third parties; so that protection was afforded to ambassadors not only during the time of their official residence within the territory, but also during their journey to the

Position of third States as to the principle of inviolability.

Duration of diplomatic duties.

¹ *Dig.* l. 7 (de legationib.), 17.

² *Dig.* l. 7 (de legationib.), 17.—Cf. Liv. xxiv. 33: "Legatis in periculum adductis ne belli quidem iura relictā erant."

³ *De off.* i. 12.

⁴ Diod. Sic. xxvii. 12: Οἱ γὰρ εἰς Ῥώμην ἀποσταλέντες πρεσβευταὶ τῶν Καρχηδονίων ἀναστρέφοντες ὑπὸ χειμῶνος κατηνέχθησαν εἰς τὸν τῶν Ῥωμαίων ναύσταθμον. Ὡν ἀναχθέντων ἐπὶ τὸν Σκιπίωνα, καὶ πάντων βούντων ἀμύνασθαι τοὺς ἀσεβεῖς, ὁ Σκιπίων οὐκ ἔφη δεῖν πράττειν ἂ τοῖς Καρχηδονίοις ἐγκαλοῦσιν. Οὗτοι μὲν οὖν ἀφεθέντες διασώθησαν εἰς τὴν Καρχηδόνα, θανμάζοντες τὴν τῶν Ῥωμαίων εὐσέβειαν.

country to which they were despatched, and during their return home. The *Digest* states that a man is considered to be absent on State service as soon as he has started from the city, though he may not yet have reached the province; and when he has once departed, he remains absent until his return to the city. ("Abesse rei publicae causa intellegitur et is, qui ab urbe profectus est, licet nondum provinciam accesserit [taking this reading instead of 'excesserit'], sed et is qui excessit, donec in urbem revertatur."¹) It is added that this rule applies to proconsuls and their legates, to imperial procurators, to military officers (*tribuni militum*), to *comites legatorum* (assessors of legates), etc. This particular provision does not mention ambassadors proper, but there is no doubt that the rule applied equally to them.

Certain
examples.

Thus, when in 189 B.C. Aetolian envoys were, on their way to Rome, intercepted by the Epirotes who demanded a ransom, an immediate despatch from Rome insisted on their release.² Again, a convention of representatives of the States that were at variance with Philip having been summoned at Tempe, in Thessaly, 187 B.C., the Thessalians said—amongst the complaints laid against that sovereign—that he did not even scruple to offer violence to ambassadors who by the law of nations are everywhere held inviolable; for he had laid an ambush for their envoys who were proceeding to Titus Quinctius.³

Sacred
embassies.

Ambassadors despatched on purely sacred missions were protected by all States, whether they were directly concerned in the embassy or not.⁴

Usual to obtain
permission to
pass through
territory of
third States.

But the obligation to observe this privilege was not necessarily imposed on States through whose territory enemy ambassadors, or those of doubtful character,

¹ *Dig.* iv. 6. 32.

² *Polyb.* xxi. 26.

³ *Liv.* xxxix. 25: "Iam ne a legatis quidem, qui iure gentium sancti sint, violandis abstinere; insidias positas euntibus ad T. Quinctium."

⁴ *Diod. Sic.* xiv. 93; cf. *ibid.* xvi. 57.

were passing without previously having obtained permission. Thus, in 215 B.C., Philip sent an embassy, with Xenophanes at the head, to Hannibal in order to negotiate for an alliance whose object was to be the subjugation of Italy. The king's envoys were descried at sea by the Roman fleet which was guarding the coasts of Calabria, and were overtaken and captured. They tried to make up some fictitious tale, but their purpose was discovered, and they were conveyed as prisoners to Rome.¹ A somewhat similar example occurred much earlier, in 495 B.C., when the Volscians having sent ambassadors to stir up Latium, the Latins (reports Livy), in view of their recent defeat received at Lake Regillus, could scarcely refrain from offering violence to the instigators, seized them and conveyed them to Rome where they were kept as prisoners. As a reward for this conduct the Latins obtained the privileges of hospitality and other favours from Rome.²

Similar rules obtained, in this respect, amongst other nations of antiquity; as, for example, in China, where envoys, though held sacred, were nevertheless arrested as spies if they passed through the dominions of a third State, without having first provided themselves with passports.³

In ancient
China—
passports.

Punishment for offences committed against foreign ambassadors was very severe. Any complaints that were made, for example, to Rome were submitted to the college of fetials for investigation. "Fetiales qui viginti, qui de his rebus cognoscerent, iudicaret et

Punishment
for offences
against
ambassadors.

Judicial
function of
the college of
fetials.

¹ Liv. xxiii. 33, 34.—Justin's account (xxxix. 4) is different: "Philippus... legatum deinde ad Hannibalem, iungendae societatis gratia, cum epistolis mittit; qui comprehensus, et ad senatum perductus, incolumis dimissus est, non in honorem regis, sed ne dubius adhuc indubitatus hostis redderetur."

² Liv. ii. 22: "... sed recens ad Regillum lacum accepta clades Latinos via odioque eius quicunque arma suaderet, ne ab legatis quidem violandis abstinuit; comprehensos Volscos Romam duxere."

³ Martin, *Traces of Int. Law in Ancient China*, loc. cit. p. 71.

statuerent, constituerunt."¹ If the offender was found guilty, the fetials then decided whether there was sufficient cause for his delivery to the outraged State; and if the decision was in the affirmative, his surrender was effected by the fetials themselves, both as satisfaction to the offended State and to appease the gods,—“ad placandos deos.” Thus Varro states: “Si cuius legati violati essent, qui id fecissent, quamvis nobiles essent, ut dederentur civitati statuerunt.”²

Delivery of offender by fetials.

Examples.

Livy relates³ that L. Minucius Myrtilus and L. Manlius having committed an offence against the Carthaginian ambassadors were surrendered by the fetials and taken to Carthage. Again, it is reported that Q. Fabius and Cn. Apronius, aediles, had, on account of a tumult that occurred, assaulted certain ambassadors who came from Apollonia to Rome, 266 B.C. Whereupon the senate ordered them to be delivered up by the fetials to the injured ambassadors, and sent a quaestor to convey them to Brundisium to protect them from any attempts that might be made on them by the friends of the surrendered culprits.⁴ “Could such a court as that,” asks the historian, “be said to be a council of mortal men, and not rather the temple of faith?” The *Digest* contains an express provision to the same effect,—“... itaque eum qui legatum pulsasset Quintus Mucius dedi hostibus, quorum erant legati, solitus est respondere.”⁵ With respect to such surrender there was a similar practice amongst the other States also. When delivery was not decided on,

Provisions in the *Digest*.

¹ Varro, *De vita pop. Rom.* iii. 8.

² *Ibid.*

³ Liv. xxxviii. 42: “L. Minucius Myrtilus et L. Manlius, quod legatos Carthaginienses pulsasse dicebantur, iussu M. Claudii praetoris urbani per fetiales traditi sunt legatis et Carthaginem evecti.”—Cf. Liv. ix. 10.

⁴ Val. Max. vi. 6. 5: “Legatos ab urbe Apollonia Romam missos Q. Fabius, Cn. Apronius aedilicii orta contentione pulsaverunt, quod ubi comperit, continuo eos per fetiales legatis dedit quaestoremque cum his Brundisium ire iussit, ne quam in itinere a cognatis deditorum iniuriam acciperent.”

⁵ *Dig.* l. 7 (de legationib.), 17.—Cf. *Dig.* xlix. 15. 4.

the culprit, in Rome, was sentenced to death, or to deportation,¹ according to the gravity of the offence.

Not infrequently the foreign government to which Roman offenders were surrendered immediately liberated them. In such cases they were seldom regarded in Rome as having sufficiently cleared themselves, and were, on the contrary, often deprived of citizenship on their return to the city. "Quia quem populus semel iussisset dedi, ex civitate expulsisse videretur, sicut faceret cum aqua et igni interdiceret."²

Roman offenders delivered up were often liberated.

The principle of exterritoriality follows naturally from that of inviolability. The latter represents the positive aspect of protection; the former, implying judicial independence in regard to the foreign State, represents the negative aspect. It was a universally recognized rule in antiquity, as has already been pointed out, that delinquent ambassadors were not subject to the tribunals of foreign countries to which they were accredited, but only to their own national jurisdiction. In the case of Rome such *legati* as were permitted to waive this privilege and submit to the territorial jurisdiction were not ambassadors in the proper sense, as recognized by the law of nations, but were simply delegates despatched by the provinces or the towns with petitions to the emperor; they were more of the nature of instruments of mere communication than of diplomacy proper.

Exterritoriality.

Ambassadors were exempt from the local civil jurisdiction as well as from the criminal jurisdiction. Their houses, however, were not held to possess such independence, and could not, as a rule, legitimately furnish an asylum to criminal fugitives.

Exemption from local civil and criminal jurisdiction.

When Jugurtha came to Rome, at the time of his war with the Romans, a plebiscite ensured his safety—"interposita fide publica"—by extending to him and

The case of Jugurtha's companion—the *ius gentium* and equity.

¹ *Dig.* xlviii. 6, 7 (quoted *supra*, p. 331).—Cf. Paulus, *Sententiae*, v. 26. 1, 2.

² *Dig.* l. 7 (legationib.), 17.

Mommsen's
view.

Objections
thereto.

Early example
of offending
envoy's
immunity from
local
jurisdiction.

his suite the immunities of ambassadors.¹ During his stay one of his companions was accused of murder and found guilty. The proceedings were instituted against the offender, says Sallust, rather by reason of equity than by the law of nations,—“fit reus magis ex aequo bonoque quam ex iure gentium.”² Mommsen observes that the question of ambassadors' immunity from the local criminal jurisdiction is an uncertain one—“bedenkliche Frage”³—and refers, in order to confirm his view, to the case of Jugurtha as one which clearly negated the claim to any exemption of this nature. But in this connection, it must be recollected,—as against Mommsen's suggestion—Sallust distinctly implies that the immunity obtained generally and was based on the *ius gentium*, but that in the case of Jugurtha's companion an exception to this rule was made on account of special and exigent circumstances. An earlier example may here be recalled. After the expulsion of Tarquin, certain envoys of the exiled monarch were despatched to negotiate for his return, or at least, for the cession of his estates; but their efforts proving futile they entered into a conspiracy with some of the young patricians for the restoration of the monarchy. The plot was discovered; their fellow-conspirators were thrown into chains, but the envoys themselves, after some deliberation, were liberated conformably to the law of nations, although they had deliberately placed themselves in the position of enemies. The supremacy of the law was thus acknowledged; the law of nations, as Livy says, prevailed. “Proditoribus extemplo in vincula coniectis, de legatis paululum addubitatum est; et quamquam visi sunt commisisse, ut hostium loco essent, ius tamen gentium valuit.”⁴ Livy also mentions a case that at first sight appears to be in contradiction to the principle of exemption from the local tribunals,—

¹ Sall. *Iug.* xxxii. 33.

² *Röm. Staatsr.* vol. iii. pt. 2, p. 1153.

³ *Iug.* xxxv. 7.

⁴ Liv. ii. 4.

as where a foreign envoy, one Phileas of Tarentum, was punished in Rome. But the historian adds, "diu iam per speciem legationis Romae quum esset," thus indicating that there was a strong suspicion as to whether he was vested with ambassadorial capacity.¹

Should any litigation arise out of the civil transactions of diplomatic functionaries, the Roman law afforded them to a large extent the privilege of resorting to the home tribunals,—the 'ius revocandi domum.' The *Digest* says² that ambassadors (as well as certain other individuals) were permitted to have cases transferred for trial to the courts of their domicile, if the question turned upon any contract entered into by them before their appointment was made. Other persons could not have the cause transferred if they made the contract where they were sued; but ambassadors were not compelled to defend their case in Rome so long as they remained there in the character of ambassadors, even though they entered into the contract there, provided they made it before the mission was undertaken.³ The privilege had no reference to contractual transactions which took place both during the continuance of the embassy and at Rome.⁴ On the contrary if they brought an action themselves they were obliged to defend any consequent action brought against them. This did not, of course, apply to their proceedings relating to some *iniuria*, or theft, or damage inflicted on them where they were resident for the time being; otherwise (as the *Digest* says) they would have to bear insults and loss without obtaining redress; and, further, it would be in any

Civil transactions of diplomatic officials—provision in the Roman law.

¹ Liv. xxv. 7.

² *Dig.* v. 1 (de iudiciis), 2. 3: "Legatis in eo quod ante legationem contraxerunt . . . revocandi domum suam ius datur."

³ *Dig.* v. 1. 2. 4: ". . . Exceptis legatis, qui licet ibi contraxerunt, dummodo ante legationem contraxerunt, non compelluntur se Romae defendere, quamdiu legationis causa hic demorantur."

⁴ *Dig.* v. 1. 2. 5. Cf. iv. 8 (de recept. arbit.), 32. 9,—as to certain similar exemptions in the case of references to arbitration.

individual's power, by attaching them, to make them amenable to the Roman jurisdiction the moment they took action for redress.¹

Loans
advanced to
foreign
envoys.

It is worthy of note that in consequence of acts of corruption committed by foreign envoys when residing in Rome, and owing also to abuses of usury, the Senate, in 94 B.C., deprived all persons who advanced loans to them of the right of action thereon.² This preliminary measure was followed up more decisively in 67 B.C. by the *lex Gabinia*.³

Voluntary
submission.

In the case of non-contentious matters the immunity did not necessarily apply. And, further, the ambassador could, if he chose, voluntarily submit to the local tribunals, in which case his independence was not deemed to be impaired.

Other
provisions in
the *Digest*.

It may be added that there are certain other provisions in the *Digest* relating to the principle of extritoriality, but it is doubtful if they are applicable to diplomatic envoys. Thus it is stated that legates were amenable to the Roman jurisdiction in respect of delicts committed during the period of their legation, whether such delicts were committed by themselves or by their slaves. An action *in rem*, founded on the fact of prescriptive possession, against a legate was allowed (as Cassius held), if it would deprive him of only one slave out of a large number, but not allowed if it would deprive him of his whole suite of attendant slaves. But Julian's view was that no action could be

¹ *Dig. v. 1. 2. 5* : "Sed si agant compelluntur se adversus omnes defendere ; non tamen si iniuriam suam persequantur vel furtum vel damnum quod nunc passi sunt ; alioquin, ut et Iulianus eleganter ait, aut impune contumeliis et damnis adficiuntur aut erit in potestate cuiusque pulsando eos subicere ipsos iurisdictioni, dum se vindicant."

² Cf. Asconius, p. 57 : "Rettulerat ad senatum ut, quoniam exterarum nationum legatis pecunia magna daretur usura turpiaque et famosa lucra ex ea fierent, ne quis legatis exterarum nationum pecuniam expensam ferret."

³ Cf. Cic. *Ad Att.* v. 21. 12 : "Salamini cum Romae versuram facere vellent, non poterant, quod lex Gabinia vetabat."—And see *ibid.* vi. 2. 7.

allowed at all ; and this, it is stated, was the better opinion, as the object of disallowing the action was to prevent the legate from being called away from the duties of his post.¹

It was a universally recognized rule that ambassadors as such were to be strictly neutral. Their functions were deemed to be purely diplomatic and not military ; so that they were necessarily debarred from engaging in hostilities. A violation of this obligation to preserve neutrality was an offence against the State to which they were accredited. As a reparation to the injured country, the unneutral envoy had to be surrendered ; failing this, war could be justly declared.

Neutrality of
ambassadors.

In 390 B.C. the Senonian Gauls, under their leader Brennus, were marching against Clusium, when the Romans, foreboding the danger, despatched as envoys three distinguished members of the Fabian gens to arrest their advance by means of negotiation. The Gauls, however, rejected the overtures made to them, and pursued their attack. So that fate now pressing hard on the Roman city, as Livy expresses it, the ambassadors, contrary to the law of nations, took up arms to assist the Etruscans in their defence,—“*ibi, iam urgentibus Romanam urbem fatis, legati contra ius gentium arma capiunt.*”² Brennus recognized Quintus Ambustus, one of the sons of Fabius Ambustus, as he slew a Gaulish warrior, and (according to the statement of Plutarch) called the gods to witness his violation of the common law of all nations, in coming to them as an ambassador and fighting against them as an enemy,—*ὡς δ' ἐπικρατήσας τῇ μάχῃ καὶ καταβαλὼν, ἐσκύλευε τὸν ἄνδρα, γνωρίσας ὁ Βρέννος αὐτὸν ἐπεμαρτύρατο*

Violation of
neutrality—a
ground for
war.

¹ *Dig. v. 1. 24. 1* : “*Legati ex delictis in legatione commissis coguntur iudicium Romae pati, sive ipsi admisserunt sive servi eorum.*”
Ibid. v. 1. 24. 2 : “*... Iulianus sine distinctione denegandam actionem : merito ; ideo enim non datur actio, ne ab officio suscepto legationis avocetur.*”

² *Liv. v. 36.*

θεοὺς, ὡς παρὰ τὰ κοινὰ καὶ γενομμένα πᾶσιν ἀνθρώποις
 ὅσια καὶ δίκαια πρεσβευτοῦ μὲν ἦκοντος, πολέμα δὲ εἰργασ-
 μένου.¹ He then demanded the surrender of the Fabii,
 unless the Romans were prepared to regard the crime
 as a public act² on their part. At the meeting of the
 senate to consider the question, the conduct of Fabius
 was censured by many; and the fetials, to whom the
 matter was then referred, urged his delivery to the
 offended people, so that the rest of the city might be
 cleared from participating in his guilt,—ἐν δὲ Ῥώμῃ τῆς
 βουλῆς συναχθείσης ἄλλοι τε πολλοὶ τοῦ Φαβίου κατηγοροῦν
 καὶ τῶν ἱερέων οἱ καλούμενοι Φητιαεῖς ἐπιθειάζοντες
 καὶ κελεύοντες τῶν πεπραγμένων ἄγος τὴν σύγκλητον εἰς ἓνα
 τὸν αἴτιον τρέψασαν ὑπὲρ τῶν ἄλλων ἀφοσιώσασθαι.³ The
 senate, however, shirked the difficulty by submitting
 the question to the assembly of the people, who dis-
 regarded the demand. Subsequently, at the battle of
 the Allia, the Roman army that was sent against the
 Gauls was completely routed.

Reward and
 punishment of
 ambassadors.

Both in Greece and in Rome ambassadors were
 usually rewarded for their good services, and not
 infrequently punished by their own States for the
 commission of offences.

There is an extant inscription presenting a fragment
 of a decree in favour of Demetrius Phalereus (born
 c. 345 B.C.) for having effected a reconciliation between
 the Athenians and the inhabitants of the Attic demus
 Aexone. In 317 B.C. Demetrius was appointed governor
 of Athens by Cassander, and the document probably

¹ Plut. *Camill.* 17.

² Appian, *De rebus Gallici*, 3 : αἰτιώμενος τοὺς Φαβίους, ὅτι,
 πρεσβεύοντες, παρὰ τοὺς κοινούς νόμους ἐπολέμησαν. ἤτει τε τοὺς
 ἄνδρας εἰς δίκην ἐκδόντας οἱ γενέσθαι, εἰ μὴ θέλουσι Ῥωμαῖοι κοινὸν
 αὐτῶν εἶναι τὸ ἔργον. Cf. Diod. Sic. xiv. 113 : Εὐήμερήσαντος δὲ
 θατέρου τῶν πρεσβευτῶν καὶ τινα τῶν ἐνδοξοτέρων ἐπάρχων ἀποκτεί-
 ναντος, γινόντες οἱ Κελτοὶ τὸ γεγονός, εἰς Ῥώμην πρέσβεις ἀπέστειλαν
 τοὺς ἐξαπτήσοντας τὸν πρεσβευτὴν τὸν ἀδίκον πολέμου προκαταρξά-
 μενον.

³ Plut. *Camill.* 18.

dates from about this time. The portion of the inscription lost perhaps stated that the Aexonians bestowed certain honours upon him, and erected to him one of the three hundred and sixty statues.¹ The part remaining runs somewhat to this effect: "To the auxiliary gods! Callicrates, the son of Aristophanes, said: 'Whereas Demetrius, the son of Phanostratus of Phalara, is a man devoted to the Athenians and to the Aexonians, and the enemy being in the country, and the Aexonians having severed themselves from the town owing to the war, he reconciled them with the Athenians . . . and restored peace to the Athenians; and having been chosen by the people as administrator of the country. . . .'"²

Similarly Poseidippus who had accompanied an embassy accredited to King Cassander was, in recognition of his benevolent disposition towards the Athenians and his services rendered to them, publicly commended in a decree and crowned with a garland of green branches.³

¹ Cf. Diog. Laert. v. 75; Cic. *Rep.* ii. 1; Corn. Nep. *Milt.* 6.

² Ἐ(πικουρίοις) Θεοῖς)
(Καλλικ)ράτης Ἀριστοφάνου εἶπεν: Ἐπειδὴ
(Δημήτρ)ιος Φανοστράτου Φ(α)ληρ(ε)ῦς ἀνὴρ (ἐ-
στιν ἀγ)αθὸς περὶ τὸν δῆμον τῶν Ἀθηναίω(ν
καὶ τὸν δ)ῆμον τῶν Αἰξωνέων, καὶ πολεμ(ίω-
ν ἐνό)ντων ἐν τῇ χώρῃ, καὶ χωρισθέντ(ων
Αἰξωνέων) καὶ τοῦ Ἀστωῦς διὰ τὸν (πόλεμ-
ον, πρὸς σφ)ᾶς διέλυσε Ἀθηναίου(ς
..... ᾶ)γῃ (?) εἰς τὸ αὐτὸ καὶ εἰ(ρή)νην
παρέσχετο Ἀ)θηαίοις, καὶ τῇ χώ(ρᾳ) ἐ-
πιμελητῆς αἰ)ρεθεῖς ὑπὸ τοῦ δήμου. . .

(Rangabé: *Antiquités helléniques*, vol. ii. no. 422.—The last two lines are inserted according to Rangabé's conjecture, based on the passage of Diodorus, xviii. 74.)

³ Rangabé, *Antiq. hell.* no. 2298 (marble stele found in 1853 near the banks of the Ilissus): ἐπειδὴ οἱ πρέσβεις, οἱ ἀποσταλέντες πρὸς τὸν βασιλέα Κόσσανδρον, ἀποφαίνουσι, Ποσειδίππον συναποδημήσαντα, μεθ' ἑαυτῶν χρήσιμον εἶναι ἑαυτοῖς, ἀποδεικνύμενον τὴν εὐνοίαν ἣν ἔχει πρὸς τὸν δῆμον τῶν Ἀθηναίων, δεδόχθαι τῷ δήμῳ, ἐπαινέσαι Π. καὶ στεφανῶσαι αὐτὸν θαλλοῦ στεφάνῳ . . .

Punishment for
misconduct.

Ambassadors
forbidden to
receive gifts.

On the other hand, severe punishment overtook such envoys as were found guilty of any acts of treachery, malversation, prevarication, or other misconduct. Plato provides in his *Laws*¹ for the misconduct of heralds or ambassadors: any envoy bearing to or from Athens a false message was to be indicted for a violation not only of the law but of the commands and duties imposed on him by Hermes and Zeus, . . . *γραφαὶ κατὰ τούτων ἔστων ὡς Ἑρμοῦ καὶ Διὸς ἀγγελίας καὶ ἐπιτάξεις παρὰ νόμον ἀσεβησάντων* . . . , and if found guilty he was to suffer a penalty determined by the State. Ambassadors were forbidden to receive presents—which might in reality amount to bribery—as clearly appears in a law quoted by Demosthenes, and probably due to Solon. Thus, Demosthenes attacking Aeschines and Philocrates for receiving presents on their embassy says, when he comes to discuss the question of corrupt motive: “I am sure you will all agree that to accept a reward for acts which are detrimental to the commonwealth is shocking and abominable. The legislator indeed does not make use of such express terms, but he absolutely prohibits the taking of bribes in any way, considering, as it appears to me, that a person who is once bribed and corrupted ceases to be even a safe judge of what is useful for the State.”² Xenophon³ and Plutarch⁴ relate that Timagoras, an Athenian ambassador accredited to Artaxerxes of Persia, was condemned to death and executed for having received presents;—and if it was for the amount of presents, adds Plutarch, the sentence was right and just, *εἰ μὲν ἐπὶ τῷ πλήθει τῶν δωρεῶν, ὀρθῶς καὶ δικαίως*. Philocrates

¹ xii. 941 A.

² *De Falsa Legat.* 7: ‘Ἀλλὰ μὴν ὑπὲρ γε τοῦ προῖκα, ἡ μὴ, τὸ μὲν ἐκ τούτων λαμβάνειν, ἐξ ὧν ἡ πόλις βλάπτεται, πάντες οὖδ’ ὅτι φήσαιτ’ ἂν εἶναι δεινὸν καὶ πολλῆς ὀργῆς ἄξιον. ὁ μὲντοι τὸν νόμον τιθεὶς οὐ διώρισε τοῦτο, ἀλλ’ ἀπλῶς εἶπε μηδαμῶς δῶρα λαμβάνειν, ἡγούμενος, ὡς ἐμοὶ δοκεῖ, τὸν ἅπαξ λαβόντα καὶ διαφθαρένθ’ ὑπὸ χρημάτων οὐδὲ κριτὴν εἶναι τῶν συμφερόντων ἀσφαλῆ μένειν τῇ πόλει.

³ *Hellen.* vii. 1. 33-38.

⁴ *Pelop.* 30.

was impeached by Hyperides before the Athenians and condemned for corruption, amongst other traitorous dealings.¹ Epicrates accused of corruption on the occasion of his embassy to Artaxerxes escaped death by voluntary exile.²

For a false assumption of the title of ambassador, or for acting in that capacity without due authority, the capital penalty was awarded. Thus Demosthenes says in reference to Aeschines' embassy to Philip that he went off as ambassador without having been appointed by either the council or the people; and that the law provided the penalty of death for such misconduct,—*οὐκοῦν ἔχeto μεν παρὰ τὸν νόμον, ὃς θάνατον κελεύει τούτων τὴν ζημίαν εἶναι*. . . .³

False
assumption of
title of
ambassador.

In the trial of offences committed by ambassadors, a special procedure before the tribunals was adopted,—*ιδίως δὲ, ἡ κατὰ τῶν πρεσβευτῶν γραφὴ, παραπρεσβείας ἐλέγετο*.⁴

Special
procedure in
trial of envoys'
offences.

Quintilian says that among the Greeks there were frequent prosecutions for offences relating to diplomatic missions. In such indictments the question was often raised whether it was at all permissible for an ambassador to act otherwise than was laid down in his instructions, and also as to the extent of the period during which the accused retained his capacity as ambassador, since some envoys terminated their office with the delivery of their message.⁵ In this connection Quintilian mentions the case of Heius, who was at the head of

¹ Hyperides, *Pro Euxenippo*, 30; cf. Demosth. *De Falsa Leg.* 116; Aeschines, *c. Ctesiph.* 79.

² Demosth. *De Falsa Leg.* 315; Lysias, *c. Epicrat.*

³ Demosth. *De Falsa Leg.* 126, 131.

⁴ Pollux, viii. 46; and cf. *ibid.* vi. 154; viii. 137.

⁵ *Inst. Orat.* vii. 4. 36: "Male gestae legationis apud Graecos et veris causis frequens; ubi iuris loco quaeri solet, an omnino aliter agere quam mandatum sit liceat, et quousque sit legatus; quoniam alii in renuntiando desinunt."—Cf. Cic. *De Invent.* ii. 29. 42, whose propositions here set forth are based on Greek doctrines.

the legation despatched by the Sicilians to Rome ;¹ here the question was whether he ought not to have returned to Sicily and reported the result of his embassy before he proceeded to give evidence against Verres.

In Rome,
impeachment
for violation
of 'auctoritas.'

In Rome *legati* were liable to an impeachment for any serious infringement of their 'auctoritas,' on the occasion of their declaring in the senate the results of their mission. Sometimes after submitting their report severe censure was passed for departures from Roman usage and tradition, or for any crookedness in their proceedings ; as, for example, in the case of the embassy to Macedon (171 B.C.) of Marcius and Atilius, whose conduct was disapproved by the older members, as Livy says, and those who retained the ancient simplicity of manners, "veteres et moris antiqui memores."² They declared they saw nothing of the Roman genius in the conduct of that embassy, that their ancestors did not glory more in cunning than in real valour. Those senators, however, who were actuated by considerations of utility rather than of honour, prevailed and passed a vote in approval of the conduct of the envoys,— "vicit tamen ea pars senatus, cui potior utilis quam honesti curat." Sallust³ gives a case of a successful impeachment (110 B.C.) of *legati* by means of a *lex* which established a *quaestio extraordinaria* (an extraordinary inquisition) to try them ; but these *legati* were not really ambassadors in the proper sense. The law *de repetundis* passed in 59 B.C. provided for the punishment of offences committed by *legati* and other public officials, chiefly in respect of acts of corruption or extortion. "Lex Iulia repetundarum pertinet ad eas pecunias, quas quis in magistratu potestate curatione legatione vel quo alio officio munere ministeriove publico cepit, vel cum ex cohorte cuius eorum est."⁴

*Quaestio
extraordi-
naria.*
The law *de
repetundis*.

¹ Cf. Cic. *In Verr.* iv. 8.

³ *Iug.* 40.

² Liv. xlii. 47.

⁴ *Dig.* xlviii. 11. 1.

CHAPTER XIV

RIGHT OF ASYLUM.—EXTRADITION (*DEDITIO*)

FOLLOWING on what was said in the preceding chapter as to the surrender (*deditio*) of those individuals who committed any breach of the law of inviolability of ambassadors, it will be convenient here to consider briefly what other offences entailed a surrender or delivery of delinquents, to what extent the practice of extradition in general obtained in Greece and Rome, and how far the right of asylum was recognized.

The right of asylum occupied a prominent place in the religious, in the political, and in the legal history of antiquity. Commanded by the gods who zealously punished all infractions of this obligation, it was in a sense above the common law; it was not necessarily antagonistic thereto, but was its supplement, its extension. It was a tutelary right of the ancient peoples, and manifested itself with comparative conspicuousness even in the very earliest development of society. As a French writer says: "Ce droit placé au-dessus du droit commun, non pour le combattre, mais pour le garder, pour le suppléer quand il fait défaut et le redresser quand il dévie; droit tutélaire des sociétés naissantes, et qui semble même avoir présidé à leur formation. . . ."¹ It was a universal recognition, spontaneously and unconsciously arrived at, of the necessity to alleviate the rigour of the law, and of the obligation to extend mercy, under certain conditions, to those in distress, and more particularly to suppliant fugitives.

Importance
of right of
sanctuary.

Divine
sanction.

¹ Wallon, *Du droit d'asile* (Paris, 1837).

Right of
asylum among
the ancient
Egyptians.

The right of asylum existed amongst the ancient Egyptians. Thus Bulmerincq, referring to the authority of earlier writers such as Fulgentius, Benhardus, Sixtus Senensis, and Alphonsus Tostatius, states that King Assyrophernes had erected a statue of his son, and decreed that offenders fleeing thereto should be protected. "Der König Assyrophernes habe seinem Sohn eine Bildsäule errichtet, die den zu ihr fliehenden Verbrechern Schutz gewährt."¹ Some writers² claim that this king was the veritable founder of the institution; but there is no doubt that its roots already existed before his time.

In Assyria.

Similarly, it is related that in Assyria King Ninus erected a statue of his father Belus, which also afforded a safe asylum under similar circumstances.³

Further
development
by the
Israelites.

The Israelites were the first people to develop the institution systematically. First the sacred altar in the temple afforded a secure protection, which was soon extended to the priests, whose proximity conferred the privilege, then to their dwellings. But certain distinctions, and exceptions relating thereto, were made, as the unconditional and absolute operation of the principle was thought to be contrary to the interests of the community. Thus, a fugitive who committed manslaughter was protected at the altar, but not a deliberate and guileful murderer.⁴ Certain cities of the Levites were places of refuge⁵ for involuntary homicides.⁶ It is noteworthy that these provisions applied equally to aliens⁷ and to slaves.⁸

¹ A. Bulmerincq, *Das Asylrecht und die Auslieferung flüchtiger Verbrecher.—Eine Abhandlung aus dem Gebiete der universellen Rechtsgeschichte und des positiven Völkerrechts* (Dorpat, 1853), p. 12.

² E.g. Simon, *Des ayles* (in *Hist. de Pacad. des inscrip. et belles lettres*, Paris, 1746, p. 36); cf. Otto von Gerlach, *Das alte Testament* (Berlin, 1847), p. 199.

³ Cf. Helfrecht, *Historische Abhandlung von den Asylen* (Hof, 1801), p. 9; Simon, *loc. cit.* (These references are given by Bulmerincq, *op. cit.*)

⁴ *Exod.* xxi. 12-14.

⁵ *Numb.* xxxv. 6, and 22-25.

⁶ *Josh.* xx. 1-4; *Deut.* xix. 1-5.

⁷ *Numb.* xxxv. 15.

⁸ *Deut.* xxiii. 15, 16.

Coming to Greece we find that suppliants were there likewise considered to enjoy inviolability, *ἀσυλία*, and to be under the direct protection of Zeus. There were express legislative measures in their favour.¹ In the Hellenic world the right of asylum was of the utmost importance. It exercised a particularly beneficial influence in view of the constant interstatal conflicts and intestine party strife, together with the universal practice of forced or voluntary banishment.

Theseus, as Plutarch says, was buried in the midst of the city, near the site where the Gymnasium was afterwards erected; and his tomb served as a place of sanctuary for slaves, and for all who were poor and oppressed,—*καὶ κεῖται μὲν ἐν μέσῃ τῇ πόλει παρὰ τὸ νῦν γυμνάσιον ἔστι δὲ φύξιον οἰκέταις καὶ πᾶσι τοῖς ταπειντέροις καὶ δεδιώσι κρείττονας*.²

In Greece,
suppliants
enjoyed
ἀσυλία.

Theseus' tomb
as a sanctuary.

Similar refuge was found in the Greek temples. Polybius mentions, for example, the temple of Artemis, situated between Cleitor and Cynaetha, which was regarded by the Greeks as offering an inviolable refuge,—*τὸ τῆς Ἀρτέμιδος ἱερόν, ὃ κεῖται μὲν μεταξὺ Κλείτορος καὶ Κυναίθης, ἄσυλον δὲ νενόμεσται παρὰ τοῖς Ἕλλησιν*. . . .³ And Livy refers to these *asyla* and to the Delian temple of Apollo in particular, “. . . templum est Apollinis Delium . . . ubi et in fano lucoque ea religione et eo iure sancto quo sunt templa, quae asyla Graeci appellant. . . .”⁴ Polybius, again, speaking of the impious nature (*πρᾶγμα πάντων ἀσεβέστατον*) of the murder of the Ephors by the Spartans in the temple of Athene of the Brazen-house, says that the enormity of the crime will be realized when it is recollected that the sanctity of this temple was such that it gave a safe asylum even to criminals sentenced to death,—*καίτοι πᾶσι τοῖς καταφυγούσι τὴν ἀσφάλειαν παρεσκεύαζε τὸ ἱερόν, καὶ θανάτου τις ἢ κατακεκριμένος*. The sanction of this obliga-

Greek temples

¹ Diod. Sic. xiii. 26 : οἱτοι πρῶτοι τοὺς καταφυγόντας διασώσαντες τοὺς περὶ τῶν ἱκετῶν νόμους παρὰ πᾶσιν ἀνθρώποις ἰσχύσαι παρεσκεύασαν.

² *Thes.* 36.

³ *iv.* 18.

⁴ *xxxv.* 51.

tion was imposed by the "common laws of the Greeks,"
—*κοινὰ τῶν Ἑλλήνων νόμιμα*.¹

It would seem that strangers and slaves, as well as other fugitives, had access only to the public temples, τὰ δημοτελῆ, and not to the temples consecrated for the use of a particular community, τὰ δημοτικά;² and, further, those who were ἄτιμοι (corresponding to the 'capite deminuti' of the Roman law), that is, deprived of civic rights, were excluded.

Intentional
crimes—
and asylum.

As in the case of the ancient Hebrews, it was frequently insisted on by the Greeks that altars afforded an asylum only for involuntary offences, and not for intentional crimes. Thus in a dispute relating to the temple of Delium, the Boeotians accused the Athenians of sacrilege, and of drawing the sacred waters for common use. The latter's defence was based on the ground that they could not help themselves with regard to the water; that its use was a necessity they had not incurred wantonly, being due to the exigencies of self-defence when the Boeotians attacked their territory. Finally, the Athenians reminded their accusers that only those who committed an involuntary offence obtained a refuge at the altar, and that they alone were transgressors who deliberately committed a wrongful act, and not such as presumed a little in their distress.³

Temples—and
belligerent
fugitives.

Very frequently, however, temples in Greece gave security even to robbers, besides rendering inviolable fugitive slaves, and those flying from the enemy,—*ἔστι δούλω φεύξιμος βωμός, ἔστι καὶ λησταῖς ἀβέβηλα πολλὰ τῶν ἱερῶν καὶ πολεμίους φεύγοντες, ἀν' ἀγάλματος λάβωνται ἢ ναοῦ, θαρρόουσιν*.⁴

¹ Diod. Sic. xix. 63.

² Cf. S. Petitus, *Leges Atticae* (1635), p. 77: "Peregrinis servisque licere publica Atheniensis populi templa adire, vel videndi causa, ibidemque supplicibus sedere"; cf. *ibid.* p. 84.

³ Thuc. iv. 98: καὶ γὰρ τῶν ἀκουσίων ἁμαρτημάτων καταφυγὴν εἶναι τοὺς βωμούς, παρανομίαν τε ἐπὶ τοῖς μὴ ἀνάγκη κακοῖς ὀνομασθῆναι, καὶ οὐκ ἐπὶ τοῖς ἀπὸ τῶν ξυμφορῶν τι τολμήσασιν.

⁴ Plut. *De superst.* 4.

Oracles often pronounced suppliants to be inviolable, *—τοὺς ἱκέτας μου ἐκ τοῦ νηοῦ κεραίξει;*¹ and any breach of this established rule was punished both by sacred law and by municipal law. Pausanias relates that the fate that overtook Helice was one among the many warnings of divine retribution for offences committed against suppliants, and that the god at Dodona also enjoined their protection.² “For about the time of Aphidas, verses to the following effect were sent to the Athenians by Zeus of Dodona: ‘Take heed of the Areopagus and the incense-laden altars of the Eumenides, where the Lacedaemonians shall supplicate you when they are sore pressed in war. Put them not to the sword, nor wrong the suppliants, for suppliants are sacred and hallowed.’”

Suppliants
inviolable—
protected by
the oracles.

Divine
retribution
for non-
observance of
the privilege.

‘τοὺς μὴ σὺ κτείνε σιδήρῳ,
μηδ’ ἱκέτας ἀδικεῖν· ἱκέται δ’ ἱεροί τε καὶ ἄγνοί.’³

When the Lacedaemonians took refuge in the Areopagus, the Athenians were mindful of the counsel given to them. But later, when Cylon and his faction took possession of the Acropolis, the Athenian magistrates themselves put to death the suppliants of Athena, wherefor, says Pausanias, the slayers and their descendents were held to be accursed of the goddess,—*ἐναγείς τῆς θεοῦ*.⁴ Again, the Lacedaemonians slew men who had sought an asylum in the temple of Poseidon at Taenarum, and soon afterwards their city was shaken by such a prolonged and severe earthquake that not a single house in Lacedaemon withstood the shock.⁵ Earlier in his work Pausanias mentions that the Lacedaemonians, heedful of the warning of the Pythian

¹ Herodot. i. 159; cf. *ibid.* i. 157-159.

² Pausan. vii. 25. 1: Τὸ δὲ τοῦ Ἰκεσίου μήνιμα πάρεστι μὲν τοῖς ἐς τὴν Ἑλικὴν, πάρεστι δὲ καὶ ἄλλοις διδαχθῆναι πολλοῖς ὡς ἔστιν ἀπαραίτητον. φαίνεται δὲ καὶ ὁ θεὸς παραινῶν ὁ ἐν Δωδώνῃ νέμειν ἐς ἱκέτας αἰδῶ.

³ *Ibid.*

⁴ *Ibid.*

⁵ Pausan. vii. 25. 2: . . . ἡ πόλις συνεχεῖ τε ὁμοῦ καὶ ἰσχυρῶ τῇ σεισμῷ, ὥστε οἰκίαν μηδεμίαν τῶν ἐν Λακεδαίμονι ἀντισχεῖν.

priestess that vengeance would overtake them if they maltreated the suppliants of Zeus of Ithome, allowed the Messenians to leave Peloponnesus under a truce,—
*ὑπόσπονδοι μὲν ἐκ Πελοποννήσου τούτων ἔνεκα ἀφείθησαν.*¹

Offences to be
duly expiated.

All offences against the right of asylum had to be duly expiated. The Ephors having attempted to arrest Pausanias, he fled to the temple of Athena; but he was there shut in and starved to death. The curse of the Delphian god was therefore pronounced against the Spartans, and they were also commanded by the oracle to dedicate two brazen statues as an expiation.² Cassandra, on the capture of Troy, fled into the sanctuary of Athena, but was said to have been torn away from the statue of the goddess by Ajax, the son of Oileus.³ But Athena, according to one account, exacted due vengeance. When on his voyage home Ajax reached the Capharean rocks on the coast of Euboea, his ship was wrecked in a tempest, he himself was killed by Athena with a flash of lightning, and his body was washed upon the rocks.⁴

Infractions
denounced by
States.

Sometimes in diplomatic negotiations, or in the special mission of envoys, violation of this duty was strongly denounced. Thus in the speech of Chlaeneas, the Aetolian, at Sparta (322 B.C.), complaint was made of Antipater's cruel and wrongful treatment of Greeks, and of his going so far as to drag some from the temples and others from the altars,—*ὧν οἱ μὲν ἐκ τῶν ἱερῶν ἀγόμενοι μετὰ βίας, οἱ δ' ἀπὸ τῶν βωμῶν ἀποσπώμενοι. . . .*⁵

The protection thus afforded to suppliants, whether

¹ iv. 24. 7; and cf. Thuc. i. 103.

² Thuc. i. 126.

³ Virg. *Aen.* ii. 403-5:

“Heu nihil invitis fas quemquam fidere divi!
 Ecce trahebatur passis Priameia virgo
 Crinibus a templo Cassandra adytisque Minervae.”

Cf. Herodot. viii. 54; Eurip. *Troad.* 70 *seq.*

⁴ Cf. Virg. *Aen.* i. 40 *seq.*; xi. 259-260:

“... scit triste Minervae
 Sidus et Euboicae cautes ultorque Caphereus.”

⁵ Polyb. ix. 29.

in time of peace or in time of war, was not merely a sacerdotal privilege, as Laurent observes; it was the voice of humanity re-echoed through the oracles. "... Le droit d'asile n'est pas un privilège sacerdotal, c'est la voix de l'humanité qui parle par la bouche des prêtresses de Delphes."¹

Further, apart from the sacred sanction, positive law dealt severely with those who were found guilty of this sacrilege, *ιεροσυλία*,—which included violation of asylum as well as temple robbery. Sometimes the capital penalty was awarded, entailing burial outside Attic territory, and confiscation of the property of the condemned; sometimes the sentence was banishment, in addition to an imprecation, as, for example, in the case of the murderers of Cylon and his companions,² who were torn away from the altar in the Acropolis.

In the case of belligerent relationships,³ however, the practices of States as to the treatment of suppliants and fugitives differed greatly, especially so in the absence of express understandings on the subject. Some cities showed a striking humaneness, others a merciless rigour. Thus, after the taking of Athens by Lysander, the Spartans treated Athenian fugitives with little clemency, whilst the measures of the Thebans were highly generous. Plutarch says that the government of Thebes issued a decree providing that every city and every house in Boeotia should be open to those Athenians who required shelter, and that whoever did not offer assistance to an Athenian exile against anyone who tried to force him away should be fined a talent, —οἰκίαν μὲν ἀνεῶχθαι πᾶσαν καὶ πόλιν ἐν Βοιωτίᾳ τοῖς δεομένοις Ἀθηναίων, τὸν δὲ τῷ ἀγομένῳ φυγάδι μὴ βοηθήσαντα ξημίαν ὀφείλειν τάλαντον.⁴

¹ *Hist. du dr. des gens*, vol. ii. p. 135.

² Thuc. i. 126: καὶ ἀπὸ τούτου ἐναγείς καὶ ἀλιτήριοι τῆς θεοῦ ἐκείνοί τε ἐκαλοῦντο καὶ τὸ γένος τὸ ἀπ' ἐκείνων.

³ On this see more fully *infra*, chap. xxv.

⁴ Plut. *Lysand.* 27.

Protection of
political
fugitives.

Those who, for any reason, fled from their country and threw themselves on the mercy of foreign States usually received effective protection. When Pausanias was condemned to death by Sparta for having failed to convey timely succour to Lysander, he found a safe refuge near his own city, in the town of Tegea.¹

Conventions as
to right of
asylum.

Not infrequently cities entered into special conventions with regard to the right of asylum in their respective territories. Thus there is preserved a document embodying the note that was exchanged between the Ionians of Paros and the Allarians of Crete on the subject of this right.²

Certain
practice of
neutralization.

Sometimes, again, a number of States agreed to regard certain temples and, indeed, entire towns, as enjoying a permanent privilege of affording protection to fugitives, —an early form of the practice of neutralization. A

Case of Teos.

remarkable instance of this is the case of Teos, concerning which there is extant a series of important and interesting documents³ attesting the recognition by twenty-five States of the right of asylum there; and in 193 B.C. Rome associated herself in favour of this provision. The town and territory of Teos hence remained sacred, possessed the right of sanctuary, and enjoyed exemption from the payment of tribute to Rome.⁴

Right of
asylum in
Rome.

In Rome the privilege⁵ was not so emphatically recognized as it was in Greece. There appears to be no Latin word exactly conveying the sense of inviolability, no word possessing the significance of the

¹ Plut. *Lysand.* 30.

² *Corp. inscrip. Graec.* no. 2557; J. Barbeyrac, *Histoire des anciens traités*, 2 vols. (Amsterdam, 1739), no. 338; Michel, *Recueil d'inscrip. gr.* no. 47.

³ *Corp. inscrip. Graec.* nos. 3045 seq.; Michel, *Recueil d'inscrip. gr.* nos. 51 seq.; cf. Egger, *Traité public*, p. 157.

⁴ *Ibid.* no. 3045: ... κρίνομεν εἶναι τὴν πόλιν καὶ τὴν χώραν ἱερὰν, καθὼς καὶ νῦν ἔστιν, καὶ ἀσυλον καὶ ἀφορολόγητον ἀπὸ τοῦ δήμου τοῦ Ῥωμαίων....

⁵ See also, on right of sanctuary in war, chap. xxv.

Greek term *ἀσυλία*. A remark of Livy¹ respecting the asylum at Delos tends to indicate that this privilege had never really become nationalized in Rome, at least as a regular established institution.²

In the later portion of Roman history we find comparatively few examples of effective refuge afforded by altars and temples. In the more ancient epochs, tempered by the salutary influences of their all-pervading religion, the practice was undoubtedly more prevalent. To Romulus is usually attributed the innovation of the right of asylum in Rome. Thus, according to the account of Dionysius, Romulus finding that many cities in Italy were ill-governed tyrannies or oligarchies invited fugitives from those cities to his own dominion, provided they were freemen. He did this, says the historian, with a view to augmenting the power of the Romans, on the one hand, and to diminishing that of their neighbours, on the other; and this design he concealed under the specious pretence of doing honour to the gods. Accordingly he consecrated the wooded place between the Capitol and the Citadel, and made it an asylum for all suppliants; and if they agreed to remain with him he conferred citizenship upon them, and promised them a portion of the lands he would take from the enemy. Τὸ γὰρ μεταξύ χωρίον τοῦ τε Καπιτωλίου καὶ τῆς ἄκρας . . . ἱερὸν ἀνεῖς ἄσυλον ἰκέταις . . . καὶ εἰ βούλονται παρ' αὐτῷ μένειν, πολιτείας μετεδίδου καὶ γῆς μοῖραν, ἣν κτήσαιο πολεμίους ἀφελόμενος.³

Alleged
establishment
by Romulus.

No divinity relative to this alleged consecration appears to be mentioned by any of the ancient writers. It has been conjectured that it was the temple of Veiovis, a deity whose worship was of an expiatory nature, and whose sanctuary was in the vicinity of the sacred

¹ xxxv. 51.

² Cf. G. F. Schoemann, *Opuscula academica*, vol. i. pp. 19 seq.; Jaenisch, *De Graec. asylis*, pp. 6 seq. (References given by E. Caillemer, in Daremberg-Saglio, *Dict. des Antiq.* s.v. *Asyλία*.)

³ Dion. Hal. ii. 15; cf. Liv. i. 8; Strabo, v. 3. 2; Plut. *Romul.* 9; Dion Cassius, xlvii. 19.

wood.¹ But, as Caillemer points out,² the statement of Dion Cassius³ is rather inconsistent with this view. One is not justified, however, in going to the length of entirely discarding the story of the asylum established by Romulus, as Caillemer does,⁴ simply because the name of the tutelary divinity has not been handed down, and the exact character of the religious ceremonial not indicated. Even if the story is not true in all its particulars, there are no clear grounds to warrant a denial of its entire substance. Nor can we reject the passage in which Dionysius speaks of the temple of Diana on the Aventine as a 'sacred asylum,' *ἱερὸν ἀσύλον*.⁵ There are no conclusive reasons for inferring that the temple was merely a venerated and respected sanctuary, "un sanctuaire vénéré et respecté."⁶ There is undoubtedly some foundation for the account in the one case, and for the historian's designation in the other. Mention has already been made of Rome's respect for the inviolable nature of the sanctuary at Teos.

In later Roman history.

Flags of the legions.

In the later periods of Roman history also we find a certain measure of refuge accorded to suppliants, in spite of the fact that the right of asylum had not materialized itself into a fixed institution. Thus the flags of the legions, and the Roman eagle afforded shelter to those seeking protection.⁷ Tacitus tells how Munatius Plancus was compelled to take refuge in the camp of the first legion, how he embraced the colours there and laid hold of the eagles, thinking himself protected by the gods of the army.⁸ Another writer speaks

¹ Cf. J. A. Hartung, *Die Religion der Römer* (Erlangen, 1836), vol. ii. p. 57.

² In Daremberg-Saglio, *Dict. des Antiq. s.v. Asylos*, vol. i. p. 510.

³ xlvii. 19.

⁴ *Loc. cit.*

⁵ iv. 26.

⁶ Caillemer, *ibid.* p. 510.

⁷ Cf. Simon, *Des asyles*, *loc. cit.* p. 40; Helfrecht, *Histor. Abh. von den Asyl.*, p. 5.

⁸ *Annal.* i. 39: "... neque aliud Munatio Planco periclitanti subsidium, quam castra primae legionis; illic signa et aquilam amplexus, religione sese tutabatur."

of offenders of various kinds flying to the military standards,—“qui fraudum conscius et noxarum ad militaria signa confugit.”¹ Similarly, the statues of the emperors gave protection. Tacitus, writing of the beginning of the first century A.D., says that a licentious spirit of defamation then prevailed at Rome; members of the best society were attacked by the vile and profligate, even freedmen and slaves committed offences against their patrons and masters, and, adds the historian deplorably, the statues of the Caesars being a sanctuary sheltered criminals of the worst description. Caius Cestius, a senator, insisted that princes, no doubt, represented the gods, but the gods lent a favourable ear only to the just; and that neither the Capitol nor the temples should be places of refuge where guilt might find a shelter and even encouragement. He argued that if a woman like Annia Rufilla, recently convicted of flagrant fraud, could with impunity insult and threaten him within the very portals of the senate, and then find a valid protection in the Emperor’s statue, so as to prevent his obtaining due redress, then all good order was at an end, and the laws were no better than a dead letter.² So that, it appears, even in the most unworthy cases shelter was not infrequently procured. (Of course the object here is not necessarily to defend the practice, but merely to show its existence.)

Statues of the emperors.

Abuse of the privilege.

Again, in certain cases, to meet by chance with a vestal virgin was to some extent a protection. Thus, Plutarch says that when vestal virgins walked abroad they were escorted by lictors bearing the fasces, and that if they happened to meet any criminal who was

Chance meeting of vestal virgin.

¹ Amm. Marcell. xv. 10. 7.

² Tacit. Ann. iii. 36: “... Principes quidem instar deorum esse: sed neque a dis nisi iustas supplicium preces audiri, neque quemquam in Capitolium aliave urbis templa perfugere, ut eo subsidio ad flagitia utatur. abolitas leges et funditas versas, ubi in foro, in limine curiae ab Annia Rufilla, quam fraudis sub iudice damnasset, probra sibi et minae intenduntur, neque ipse audeat ius experiri ob effigiem imperatoris oppositam.”

House of a
flamen Dialis.

Conception of
divine
vengeance for
infringements
of the
privilege.

Punishment by
the law.

being conducted to his execution he was not put to death; but in that case the vestal was obliged to take an oath that she met him accidentally, and not on purpose.¹ Likewise the house of a flamen Dialis (priest of Jupiter) was regarded as furnishing a safe refuge.²

With the Romans, as with the Greeks and other ancient peoples, there was a prevailing belief that violations of asylum would surely call down on the offender the retribution of the gods. To this cause, for example, was attributed the tragic end of the censor Fulvius Flaccus, and also the end of Sulla. And, as the Greeks provided penalties for *ιεροσυλία* (or *ιεροσύλησις*) by their municipal law, so the Romans fixed a punishment for *sacrilegium*. At first it was 'aquae et ignis interdictio,' (deprivation from water and fire), operating originally as voluntary exile, and later assuming the form of 'deportatio in insulam,' (perpetual banishment, transportation), which also involved the confiscation of the offender's goods and loss of citizenship. Subsequently the punishment was generally 'damnatio ad bestias,' (exposure to wild beasts), and even 'vivicomburium,' (burning alive), and 'furca,' (scourging followed by crucifixion).³

The practice of
extradition.

Abuses of right
of asylum.

There were from time to time, in all the countries of antiquity, many abuses in the institution of asylum, whether in reference to their own respective citizens, or with regard to alien fugitives coming for protection. So that modifications were perforce gradually introduced both in the municipal law of each country in order to mitigate the abusive practices of such as were under its jurisdiction, and in the law of nations in order to

¹ Plut. *Numa*, 10 : ... κὰν ἀγομένην τινὲ πρὸς θάνατον αὐτομάτως συντύχῳσιν, οὐκ ἀναιρέται· δεῖ δὲ ἀπομόσαι τὴν παρθένον ἀκούσιον καὶ τυχαίαν καὶ οὐκ ἐξεπίτηδες γεγονέναι τὴν ἀπάντησιν.

² Aul. Gell. x. 15.

³ Cf. W. Rein, *Criminalrecht der Römer* (Leipzig, 1844), p. 694; and see especially T. Mommsen, *Das römische Strafrecht* (Leipzig, 1899).

restrict the admission of foreign criminals, runaway slaves, and others, and to provide for their delivery to the injured State.

There is a remarkable treaty on the subject, preserved in a document of the fourteenth century before the Christian era, and contemporary with the age of Moses, between Rameses II. (usually identified with the Pharaoh of the oppression) and the Prince of Cheta. In this treaty the principle of extradition is expressly recognized.¹ Each sovereign bound himself, in the first place, not to receive emigrants from the country of the other, and to send back fugitives, and, in the second place, to treat with clemency such as were thus extradited. These provisions show a revolutionary innovation in respect of the old doctrine which had inculcated the widespread belief that it was an act of gross impiety, subject to the inevitable punishment of the gods, to deliver up a fugitive criminal.

In China, in a treaty between the Prince of Cheng and certain allied invading princes we find an explicit provision for the extradition of fugitives from justice.²

In the time of Cyrus, it appears, the lawfulness of extradition was still doubtful. Pactyas, the Lydian, having instigated his countrymen to revolt against Cyrus, fled to Cyme; whereupon Mazares, the king's lieutenant, demanded his surrender. The Cymacans therefore despatched a messenger to Branchidae to obtain the advice of the god, who answered that extradition was allowable, though he afterwards changed his mind and reproached them for asking whether such an act of impiety was admissible. Pactyas was then sent to Mitylene, and afterwards was conveyed to Chios, whose inhabitants at last surrendered him and received the proffered reward. The Chians, however,

¹ See P. Foucart, in Daremberg-Saglio, *Dict. des Antiq.* s.v. *Asylia*; and Egger, *Traité public*, pp. 243 seq.

² Cf. Art. IV. of the outline of a Chinese treaty given by Martin (in *Inter. Review*, New York, vol. xiv. (1883) p. 72).

realized the wrongfulness of their conduct, and duly expiated it.

State interest ultimately prevailed over religious scruples.

Later, political considerations generally, and State interest more particularly outweighed religious scruples and the force of traditional custom. The danger so forcibly pointed out by the Roman senator, Caius Cestius, in regard to the indiscriminate extension of asylum to all classes of criminals, was by no means confined to Roman municipal life. The practice of extradition was therefore indispensable, and came to be exercised in two ways. In the first place, a State was enabled to demand the extradition of its own fugitive subjects for the commission of certain offences within its own territory; secondly, it could demand the surrender of the subjects of another State for having committed a crime whilst residing in the complainant's country, or for having wronged the complaining State's subjects when resident in the territory of the accused.

In what cases the demand for surrender was made.

For offence against the majesty of a State.

Extradition was always demanded for offences against the majesty of a State, such as instigating insurrection, or against individuals performing public functions. In 189 B.C. Philopoemen, in command of the Achaeans, encamped in the territory of the Lacedaemonians, and thence despatched ambassadors to Lacedaemon to insist on the surrender of the authors of the insurrection, promising that if they complied, their State would remain in peace, and that the surrendered individuals would not suffer any punishment without having obtained an opportunity of pleading their cause.¹ Some five or six years later Philopoemen led an expedition against the Messenians for having revolted, under the leadership of Dinocrates, from the league. Philopoemen was captured and conveyed to Messene where, after a mock trial, he was compelled to drink hemlock. The actors of this piece of cruelty, as Livy says, did

¹ Liv. xxxviii. 33: "... legatos deinde misit ad deposcendos auctores defectionis, et civitatem in pace futuram, si id fecisset, pollicentis, et illos nihil indicta causa passuros."

not long rejoice at his death; for Messene having been conquered surrendered the guilty individuals on the demand of the Achaeans.¹

If both surrender of the criminal and his due indictment were refused, then, in some cases, the retributive measure of *androlepsia* (ἀνδροληψία)² was sanctioned by the law of Greece; but when the circumstances were of a very serious nature, such refusal might be the ground for a justifiable declaration of war.

If surrender
refused,
androlepsia
permitted.

For a long time a certain indulgence was shown to fugitive homicides, and to others guilty of offences which were more of a private than of a public character. Frequently their extradition was not even demanded; and occasionally the country to which they fled and whose protection they invoked took special precautions to ensure their safety. Fugitive homicides who came to ask for protection, said Lycurgus, are not regarded as enemies,—οἱ μὲν γὰρ φόνον φεύγοντες εἰς ἑτέραν πόλιν μεταστάντες οὐκ ἔχουσιν ἐχθροὺς τοὺς ὑποδεξαμένους...³ Thus, in the Greek States extradition was more usual in the case of political offences than in the case of private felonies.

Fugitive
homicides.

With regard to runaway slaves the practice was generally adopted of restoring them to their masters on the receipt of a certain specified sum of money. On a marble tablet found on the Acropolis (1846) there is preserved an interesting inscription which presents a portion of an Athenian decree conferring certain honours on a Chian who, at his own expense, had sent back to Athens some fugitive slaves.⁴

Runaway
slaves.

¹ Liv. xxxix. 50: "non diuturnum mortis eius gaudium auctoribus crudelitatis fuit. Victa namque Messene bello exposcentibus Achaeis deditit noxios. . . ."

² See *infra*, chap. xxvii. *init.*

³ Demosth. c. *Aristocr.* 137.

⁴ Rangabé, *Antiq. hellén.* no. 472:

..... σου ἐκάστ(ου . . .
ἀναζητήσας . . .) τῶν ἀποδράντων . . .
σωμάτων ἐν Χίῳ, ἀπέστειλεν τῷ κυρίῳ, (πλοῖον ἐξ ἰδίων ναυ-
λωσ)άμενος εἰς ταῦτα.

International
deditio in
Rome.

Relation to
the civil
noxae datio.

The international *deditio* of the Romans bears a striking analogy to the *noxae datio* of their private law. Gaius, treating of noxal actions ('noxales actiones') in his fourth book, says that they were introduced partly by law, and partly by the praetorian edict,—thus, for theft, by the law of the Twelve Tables; for damage to property, by the *lex Aquilia*; for outrage and rapine, by the edict.¹ For a delict, such as theft or outrage committed by a son or by a slave, a noxal action lay against the father or master, who might either pay the damages assessed or deliver up the offender. For it is not just, argues Gaius, that the misconduct of a son or of a slave should render the father or the master liable to a greater loss than that of his body.² Similarly the Twelve Tables provided that compensation could be made for damage (*pauperies*) caused by an animal by means of the same process of 'noxae deditio'.³ A further application of this principle in Roman private law was in the provision relating to anticipated damage ('damni infecti'), by which the owner of a dilapidated house could exonerate himself from damage that might be caused thereby to his neighbour's property by surrendering the house. The practice of the 'noxae datio' was scarcely due entirely to religious conceptions, as several writers have suggested. No doubt, as Mommsen observes, the obligation imposed by the conscience of an honourable man had some intrinsic validity. "Der Satz, wenigstens wie wir ihn kennen, kann leichter auf die Gewissenhaftigkeit

¹ Gaius, *Inst.* iv. 76: "Constitutae sunt autem noxales actiones aut legibus aut edicto praetoris; legibus, velut furti lege XII. tabularum, damni iniuria lege Aquilia; edicto praetoris, velut iniuriarum et vi bonorum raptorum."

² *Ibid.* iv. 75: "Ex maleficiis filiorum familias servorumque, veluti si furtum fecerint aut iniuriam commiserint, noxales actiones proditae sunt, uti liceret patri dominove aut litis aestimationem sufferre aut noxae dedere. erat enim iniquum nequitiam eorum ultra ipsorum corpora parentibus dominisque damnosam esse."

³ *Iust. Inst.* iv. 9.

des rechtschaffenen Mannes als auf religiöse Motive zurückgeführt werden."¹

And so in international relationships it was universally conceived in antiquity, especially in the earlier ages, that the delivery of an offender to the offended State operated *ipso facto* as an exculpation on the part of the State, of which the guilty individual was a subject. For the presence of a tainted individual, as well as of tainted property, was thought to pollute the whole country, and consequently to bring down upon it the anger of the gods. *Deditio* possessed, on the one hand, the character of a religious atonement, of a purification to appease the offended gods, "ad placandos deos," and, on the other hand, that of a civil exculpation to ensure the avoidance of war. Thus, Caius Pontius, the commander of the Samnites, referred to both aspects of the question in his reply to the Romans, when his country's ambassadors despatched to Rome to make restitution returned without having succeeded in concluding a peace: "Whatever degree of anger the deities of heaven have conceived against us on account of the infraction of the treaty has been hereby expiated. I am confident that whatever deities they were whose will it was that we should be reduced to the necessity of making the restitution, which had been demanded according to the treaty, it was not agreeable to them that our atonement for its breach should be so haughtily spurned by the Romans. For what more could possibly be done to appease the gods and soften the anger of men than we have done?"² He goes on to say that the spoils were restored, although they became their own by the right of war, that the authors of the war

Delivery of
offender as
exculpation by
the State.

¹ *Rom. Staatsr.* vol. i. pt. i. p. 254, n. 1.

² Liv. ix. 1: "Expiatum est, quidquid ex foedere rupto irarum in nos caelestium fuit. satis scio, quibuscunque diis cordi fuit subigi nos ad necessitatem dedendi res, quae ab nobis ex foedere repetitae fuerunt, is non fuisse cordi tam superbe ab Romanis foederis expiationem spretam. quid enim ultra fieri ad placandos deos mitigandosque homines quam quod nos fecimus?"

were delivered up though dead, and their goods surrendered to the Romans, in order that no trace of contagion might remain in their country,—“ne quid ex contagione noxae remaneret apud nos.”

Italic
analogous
institutions.

It was an old tradition of the Italic peoples that an offender against an ally should be tried in the country and by the tribunals of the latter; and institutions analogous to the Roman ‘*deditio*’ also existed amongst them.¹ The procedure was in earlier times, even in Rome, applicable to offenders against foreign private individuals, as well as to offenders against States in their sovereign capacity.

Procedure in
deditio.
If injured party
a Roman.
Function of
recuperators.

If the aggrieved party was a Roman subject, he made an application to the praetor who charged the recuperators to conduct a preliminary examination of the complaint. Should an adequate ground therefore be discovered, a demand for extradition was made to the foreign government. If the delinquent was delivered up, the case was then submitted once more to the *iudicium recuperatorium*. If he was not given up, the relationships between the States concerned were transformed from a private to a public character.² The question then was not merely a violation of a private right committed by a foreign private individual against a private subject of another community, but, partly by virtue of the religious doctrine of contagion, partly through the juridical recognition of State responsibility, it became an infraction of a public right committed against Rome by the foreign State itself. In a case of this kind fetials were despatched, in the name of the Roman senate and the Roman people, to the foreign sovereign to demand satisfaction, ‘*res repetere*,’ or, if adequate reparation were refused, to declare war.³

Intervention of
the fetials.

If injured
party an alien
subject.

On the other hand, if the injured party was a foreign

¹ Liv. i. 24, 32; viii. 39; ix. 1; Dion. Hal. ii. 72.

² G. Fusinato, *Le droit international de la république romaine* (in *Rev. de dr. int. et de lég. comp.* vol. xvii. (1885), pp. 290 seq.).

³ These proceedings are considered *infra*, chap. xxvi. on the fetials.

subject, he laid his complaint before his own tribunals, and an inquiry was likewise held to determine whether there was sufficient ground for his reported grievance. If sufficient cause appeared, the foreign government sent envoys to Rome (these envoys being usually described by Livy¹ as 'oratores') to demand the surrender of the culprit. They were presented, as a rule, by the consul to the senate (as has already been shown in the case of ordinary embassies of a purely diplomatic character); and there they submitted the complaint and the grounds thereof as alleged by their injured countryman. The usual practice was then to refer the question to the college of fetials for final decision; unless it was of a complicated nature and presented much difficulty, or it involved wide issues, when a special commission of Roman citizens was charged to investigate thoroughly the affair, and facilitate the functions of the fetial magistrates.² Dionysius briefly states the law on the subject in the following terms (but it may be pointed out that in practice the extent of its application was wider than his statement appears to indicate): If any State in alliance with the Romans complain of having been injured by them and demand justice, the fetials are to inquire whether they have suffered anything in violation of their alliance, and if they find their complaints well grounded, they are to seize the guilty and deliver them up to the sufferers.³ When the extradited Roman

Foreign
oratores
demand
surrender.

Examination
by fetials.

¹ Cf. i. 38,—after the defeat of the Sabines by Tarquin, 616 B.C., when it was, however, rather a case of the ordinary surrender of an entire territory and people: "estisne vos legati oratoresque missi a populo Conlatino, ut vos populumque Conlatinum dederetis?"

ii. 13,—where Porsena sent ambassadors to Rome to demand the return of the escaped hostage Claelia: "... oratores Romam misit ad Cloeliam obsidem deposcendam."

ii. 32,—where Menenius Agrippa is designated an 'orator.'—Cf. Liv. i. 15; Virg. *Aen.* xi. 331; and see *supra*, pp. 305, 327, 328.

² Liv. iv. 30.

³ Dion. Hal. ii. 72: ἐὰν δόξωσι τὰ προσήκοντ' ἐγκαλεῖν, τοὺς ἐνόχους ταῖς αἰτίαις συλλαβόντας ἐκδότους τοῖς ἀδικηθεῖσι παραδιδόναι.

subject reached the foreign country, he was there tried by an extraordinary tribunal (usually provided for by a treaty between the States in question), which was described by the Romans as 'iudicium recuperatorium' by analogy with their own institution established for a like purpose.

Decline of the institution in case of private crimes.

In course of time, with the extension of international intercourse and the regularizing of interstate relations, together with the consequent diminution of mutual distrust, various States began to claim—especially so on the occasion of their entering into treaties—competence for their own respective tribunals to try the complaints of foreigners against their own subjects. Besides, the multiplication of cases arising out of the enlarged commercial activity of States, and—what was of frequent occurrence—the great distance between plaintiff and defendant, made it impossible for the *fetials* or the foreign envoys, as the case may be, to cope with the work. So that the system of an international jurisdiction, as it may in a sense be designated, gradually fell into desuetude.¹

Usually retained for offences of a public character.

Extradition did not, of course, entirely disappear. It continued for offences mainly, if not exclusively, of a public character,—offences which were regarded as crimes against the majesty of the State itself. There were certain differences between extradition for offences against the State, and extradition for offences against private individuals. An offence against the State usually amounted to an infringement of the law of nations; an offence against private individuals usually resolved itself into a contravention of foreign muni-

¹C. Sell, *Die Recuperatio der Römer*, p. 154: "Denn die jedesmalige Sendung der *Fetialen* war, als die Römer immer mehr mit den verschiedensten Völkern in Berührung kamen, und also auch die wechselseitig verübten Verbrechen häufiger wurden, zu weitläufig. Überdies war aber auch der Grund im Laufe der Zeit weggefallen, der jener Verfahrensart das Dasein gegeben, und die Möglichkeit verschwunden, den früheren Gang der *Procedur* fortwährend beizubehalten."

cial law. Extradition in the first case was preceded by a preliminary *cognitio extraordinaria*, (extraordinary judicial inquiry), and then by a regular trial culminating in a precise sentence accompanied by a statement of the grounds therefor. Extradition in the second case presupposed an already established treaty between the countries involved, stipulating the mutual resort to the procedure, and furnishing a juridical sanction for it. Again, extradition for offences against private individuals was effected 'ad iudicandum'; but for a breach of the law of nations, it was effected 'ad puniendum,'—in which case the State to which the offender was delivered could fix the penalty, just as (in the comparison aptly made by Fusinato¹) the 'receptor noxae' (the injured person to whom the offending individual was surrendered) of private law acquired over the 'deditus' an unlimited 'potestas statuendi' (power to determine his fate).

The commonest cases which involved offences against the law of nations, and in which extradition was allowed by Rome, and reciprocally by other States, may now be briefly referred to. In the first place may be mentioned violation of the sacred and inviolable character of ambassadors, and secondly, breach by the ambassadors themselves of their obligation to observe neutrality and not take up arms. These two cases have already been considered.²

Thirdly, extradition was resorted to in the case of conspirators or instigators of war or rebellion, even if the offending individuals were subjects of the State effecting their surrender. Thus, the Caeritians delivered (351 B.C.) to Rome the Tarquinians, as the instigators of their revolt. The Caeritians pleaded that the Tarquinians passing through their territory with a hostile army, after they had asked for nothing but a passage, forced some of their peasants to accompany them in their depredation; and that they were therefore prepared

¹ *Loc. cit.*

² See *supra*, pp. 335 *seq.*, 341 *seq.*

either to deliver them up, or inflict due punishment on them,—“eos seu dedi placeat, dedere se paratos esse, seu supplicio adfici, daturos poenas.”¹ In 329 B.C. the Fundanians surrendered to Rome three hundred and fifty conspirators,—though the senate refused to accept such submission, as they thought the people of Fundi wished to go unpunished by sacrificing needy and humble persons.² In 314 B.C. Sora delivered up to Rome two hundred and twenty-five men pointed out as the authors of a revolt, and also as being responsible for the massacre of Roman colonists,—“infandae colonorum caedis et defectionis auctores.”³ They were brought to Rome, scourged with rods in the forum, then beheaded. In 205 B.C. Mandonius and other Spanish chiefs were given up to Rome for having fomented the war.⁴ Again, in 198 B.C. the Boeotians delivered up to Rome certain individuals who were guilty of massacres of Roman citizens, as they had been unable to commence open war.⁵ And, again, a few years later (193 B.C.) the Aetolians surrendered to the Romans certain of their number for having instigated the inhabitants of Naupactum to defection.⁶

Incursions in
absence of
regular war.

Deditio was also granted for incursions into the territory of States, in the absence of regular war. Thus, according to the account of Dionysius, ambassadors from the injured Laurentes came to Rome to demand justice, τὰ δίκαια ἀπαρτεῖν, for an attack on their territories by some friends of Tatius; and Romulus was of opinion that the offenders ought to be delivered up to the sufferers. Ἀφικομένης δὲ πρεσβείας παρὰ τῶν ἡδικομένων καὶ τὰ δίκαι' ἀπαυτοῖσιν, ὁ μὲν Ῥωμύλος ἐδικαίωσε παραδοῦναι τοὺς δράσαντας τοῖς ἀδικηθεῖσιν ἀπάγειν.⁷

Violation of
treaty.

Further, violation by a citizen of any provision in a treaty rendered him liable to surrender to the offended

¹ Liv. vii. 20.

² Liv. viii. 19; viii. 39.

³ Liv. ix. 24.

⁴ Liv. xxix. 3.

⁵ Liv. xxxiii. 29.

⁶ Liv. xxxvi. 28.

⁷ Dion. Hal. ii. 51.

government, apart from his having committed an act for which, in any case, *deditio* could be lawfully demanded.¹

Sometimes, also, at the conclusion of a war, in which the defeated side had been the first to commence hostilities, those who had been responsible for the war were ordered to be delivered up to the victors. Thus, after the defeat of the Samnites (330 B.C.) Brutulus Papius was mentioned as the principal author of the war. The praetors having taken the opinion of the assembly, a decree was passed to the effect that he should be surrendered to the Romans, "...decretum fecerunt, ut Brutulus Papius Romanis dederetur," and along with him all the spoil and prisoners taken from the Romans, and that the restitution demanded by the fetials, conformably to the treaty, should be made, as was agreeable to justice and equity,—"quaque res per fetiales ex foedere repetitae essent, secundum ius fasque restituerentur." Thereupon, the Samnite heralds were despatched to Rome with the dead body of Brutulus, who had in the meantime taken his life to avoid ignominious punishment.²

At conclusion of war, the individuals responsible for the war sometimes surrendered to conquerors.

Again, when a Roman general concluded with the enemy a *sponsio*, the terms of which were subsequently repudiated by Rome as being detrimental to State interest or inconsistent with any aspect of public policy, the Romans surrendered him and his 'con-sponsores,' his colleagues in the engagement, to the enemy, as a compensation for their refusal to ratify the *sponsio* in question.³ This international procedure obviously bears some analogy to that of the *noxae datio* of the Roman municipal law. From the strictly legal point of view the Romans held that such a *sponsio* in no way bound them as a whole nation, but that it merely gave the other State a personal action

Sponsors surrendered, if *sponsio* not ratified.

¹ Liv. viii. 39.

² Liv. viii. 39.

³ Liv. ix. 8, 9, 10; Plut. *Tib. Gracch.* 7; Cic. *De off.* iii. 30; *De orat.* i. 40; ii. 32.

(‘*ex contractu*’) against the sponsor;—“*sponsio . . . neminem praeter sponsorem obligat.*”¹ Rubino² is of the opinion that the practice of annulling such *sponsiones* was not introduced into Rome until the time of the Republic. No doubt it was then more frequently practised; but the legal point of view adopted by the Romans in their annulment of undesirable *sponsiones* was by no means peculiar to their Republican constitution, nor inconsistent with pre-Republican jurisprudence. *Deditio* was granted in this case partly to satisfy the other party to the *sponsio*, and partly to appease the gods, “*ad placandos deos ut populus religione solvatur*”; otherwise the contagion of the sponsor who had thus become, through his government’s refusal to confirm his act, a *periurus*, an *exsecratus*, would, it was thought, taint the entire community amongst which he remained. Due expiation must be made for an impious deed,—“*facinus impium propter quod expiatio debetur.*”

Striking
example in the
case of the
Caudine peace.

A striking instance of this kind of surrender was that arising out of the Caudine peace. In the war between Rome and Samnium for the conquest of central Italy, the great mass of the Roman army was on one occasion enticed into a defile at Caudium—the ‘*furcae Caudinae*’,—and along with its two consuls, Postumius and Veturius, four legates, two quaestors, and twelve tribunes of the legions was compelled to pass under the yoke. Six hundred knights were retained as hostages for the resulting peace which the consuls concluded in the name of their city (321 B.C.). The senate and the people at once repudiated this *sponsio*, on the ground that it had been entered into without their authority,—“*iniussu enim populi senatusque fecerant.*”³ “When the customary decrees of the senate were passed,” says

¹ Liv. ix. 9.

² J. Rubino, *Untersuchungen über römische Verfassung und Geschichte* (Cassel, 1839), pp. 264 seq.

³ Cic. *De off.* iii. 30.

Livy in his vivid account of the matter, "the consideration of the Caudine peace was moved; and Publilius, who was in possession of the fasces, said: 'Spurius Postumius, speak.' He arose with just the same countenance with which he had passed under the yoke, and spoke in this wise: 'Consuls I know full well that I have been called upon first not as an honour to me, but as a mark of ignominy; and that I am ordered to speak, not as a senator, but as an individual responsible for an unsuccessful war as well as for a disgraceful peace. However, since the question under consideration is not that of our guilt, but of our punishment, I waive all defence, which would not be very difficult to advance before men who are not unacquainted with human casualties or necessities, and shall merely state in brief terms my opinion on the matter in question. And this opinion will show whether I meant to spare myself or your legions, when I engaged as surety to the convention, whether it was dishonourable or necessary. Now I hold that the Roman people are not bound by it, inasmuch as it was concluded without their order; and that nothing is thereby liable to be forfeited to the Samnites, except our persons. Let us therefore be surrendered to them by the heralds, naked and in chains. Let us thus liberate the people from any religious obligation we may have been the cause of imposing on them; so that there may be no hindrance to your re-entering on the war without violating either religion or justice.'"¹ Accordingly, Postumius and the

¹ Liv. ix. 8: "Quo creati sunt die, eo (sic enim placuerat patribus) magistratum inierunt, solemnibusque senatus consultis perfectis, de pace Caudina rettulerunt; et Publilius, penes quem fasces erant, 'Dic, Sp. Postumi,' inquit. Qui ubi surrexit, eodem illo vultu, quo sub iugum missus erat, 'Haud sum ignarus' inquit 'consules, ignominiae, non honoris causa me primum excitatum iussumque dicere, non tanquam senatorem, sed tanquam reum qua infelicis belli, qua ignominiosae pacis. Ego tamen, quando neque de noxa nostra neque de poena rettulistis, omitta defensione, quae non difficillima esset apud haud ignaros fortunarum humanarum necessitatumque, sententiam de eo, de quo rettulistis, paucis peragam; quae sententia

other sureties at once resigned their offices and were delivered to the fetials, whose duty it was to conduct them to Caudium. On reaching the gate the victims were stripped of their clothes, and their hands were tied behind their backs. In the assembly of the Samnites one of the fetials, viz. the *pater patratus*, formally surrendered them, in pronouncing these words: "Inasmuch as these men became sureties for a treaty, without the sanction of the Roman people, and thus rendered themselves criminally liable, I hereby surrender them into your hands, in order that the Roman people may thereby be absolved from the impious offence" ("Quandoque hisce homines iniussu populi Romani Quiritium foedus ictum iri spoponderunt, atque ob eam rem noxam nocuerunt, ob eam rem, quo populus Romanus scelere impio sit solutus, hosce homines vobis dedo" ¹).

The case of
the *sponsio*
Numantina.

A similar example was the surrender by the fetials, through the *pater patratus*, of C. Hostilius Mancinus as a result of the rejection by Rome of the *sponsio Numantina* ² (137 B.C.), which the Romans likewise held to have been concluded without the due authority of the senate,—"*sine senatus auctoritate foedus fecerat.*" ³ But, as the Samnites had done, the Numantians sent back the surrendered sponsor, on the ground that a public violation of faith ought not to be expiated by the blood of a single individual.⁴ On his return to Rome,

testis erit, mihine an legionibus vestris pepercerim, quum me seu turpi seu necessaria sponsione obstrinxi; qua tamen, quando iniussu populi facta est, non tenetur populus Romanus, nec quicquam ex ea praeterquam corpora nostra debentur Samnitibus. Dedamur per fetiales nudi vinctique; exsolvamus religione populum, si qua obligavimus, ne quid divini humanive obstet, quo minus iustum piumque de integro ineatur bellum."

¹ Liv. ix. 10.

² Cic. *De orat.* i. 40; ii. 32; *Pro Caec.* 34; cf. Cic. *De off.* iii. 30.

³ Cic. *De off.* iii. 30.

⁴ Velleius, ii. 1: "... illum recipere se negaverunt, sicut quondam Caudini fecerunt, dicentes, publicam violationem fidei non debere unius lui sanguine."

however, he was deprived of Roman citizenship, as the principle of *postliminium* could not operate in the case of those who had been surrendered by the fetials.¹ But subsequently a special law was passed to restore him to his former civic rights.²

Owing to the annulment of the *sponsio* concluded with Corsica (236 B.C.) by M. Claudius, the legate of Varus the consul,—the non-ratification in this case having been attributed to the fact that he was not the commander but that he had acted only on his own responsibility, *ὡς αὐτοκράτωρ*, as it has been expressed³—the sponsor was delivered by the fetials to the enemy; but his surrender, too, was not accepted.⁴ On his return to Rome he suffered the penalty of proscription, according to some authorities, that of death, according to others.

In the case of the rejection of the two *sponsiones* entered into with Jugurtha (111 and 110 B.C.) by the consul L. Calpurnius and the legate A. Postumius, there was no *deditio* at all. The Romans, in justification of their conduct, alleged in the first place—though more particularly with regard to the non-ratification of the second *sponsio*—that no convention could bind the people without their authority,⁵ and, secondly, that—in the opinion of some writers⁶—Jugurtha was considered outside the law of nations; or that—in the opinion of others⁷—Rome did not

¹ Cic. *De orat.* i. 40: "Memoria proditum est quem pater patratu dedidisset ei nullum esse postliminium."

² *Dig. l. 7* (de legationib.), 17: "... lex postea lata est ut esset civis Romanus."—Cf. *Dig. xlix. 15* (de captiv.), 4.

³ Zonaras, viii. 18.

⁴ Val. Max. vi. 3. 3.

⁵ Sall. *Iug.* 39: "... suo atque populi iniussu nullum potuisse foedus fieri."

⁶ E.g. Nissen, *Der caudinische Friede* (in *Rheinisches Museum für Philologie*, 1870, vol. xxv. p. 49).

⁷ E.g. Rubino, *Untersuchungen* ..., *ut sup.*, p. 287, note 2: "Eine Auslieferung trat in diesen zwei Fällen wahrscheinlich deshalb nicht ein, weil man gegen den selbst bundbrüchigen Jugurtha keine religiösen Rücksichten zu beobachten hatte."

deem herself bound to him by the tie of *religio*, as he had himself broken the alliance. Mommsen urges, however,—and this appears to be the better opinion—that Rome refused to grant a surrender of the sponsors not because Jugurtha was regarded as outside the law of nations, but because it was held that from a juridical point of view the *sponsio* could be nullified without *deditio* being a necessary consequence of such action ; and that, as for the question of *religio*, the Romans at that epoch did not trouble themselves too much about it.¹

¹ *Röm. Staatsr.* vol. i. pt. i. note 2 : “ In den Jahre 643 und 644 unterblieb sie ebenfalls, wohl nicht weil man Jugurtha als ausserhalb des Völkerrechts stehend betrachtete, sondern weil die Cassirung des Vertrages an sich auch ohne die Auslieferung möglich war und man es mit der *religio* nicht mehr genau nahm.”

CHAPTER XV

NEGOTIATION AND TREATIES

As was shown in the chapter dealing with ambassadors, international or interstatal negotiations had attained in ancient times to a high state of development ; so that we find a large variety of treaties and compacts, and a consequent richness of terminology relating thereto. Different kinds of treaties and pacts.

The following are some of the different kinds of such agreements which obtained amongst the Greeks¹ :—

The *συνθήκη*,² a general term for convention, covenant, treaty ; the term is sometimes used in the plural to denote the articles of agreement.³ *συνθήκη.*

Occasionally *σύνθεσις*⁴ or *συνθεσίαι*⁵ is used (especially by the poets) with the same meaning as *συνθήκη*. *σύνθεσις.*

Ὁμολογία, agreement or compact ; frequently employed in reference to terms of surrender.⁶ *ὁμολογία.*

Διαλλαγή, a truce ; terms of reconciliation on the cessation of hostilities.⁷ *διαλλαγή.*

Σύνταξις,⁸ a covenant, contract.

σύνταξις.

¹ Cf. Egger, *Études hist. sur les tr. pub.* . . . , chap. i.

² Thuc. v. 31, etc.—Aristotle discussing the meanings of law (*νόμος*) and contract (*συνθήκη*), says that the law itself is a kind of contract, so that anyone who violates a contract violates the law,—*καὶ ὅλως αὐτὸς ὁ νόμος συνθήκη τις ἐστίν, ὥστε ὅστις ἀπιστεῖ ἢ ἀναιρεῖ συνθήκην, τοὺς νόμους ἀναιρεῖ* (*Rhet.* i. 15).

³ Thuc. viii. 37 ; cf. Plato, *Crito*, 54 c.

⁴ Pindar, *Pyth.* iv. 299.

⁵ Hom. *Iliad*, ii. 339.

⁶ Herodot. vii. 156 ; viii. 52 ; cf. Thuc. vi. 10 ; Plato, *Theaet.* 145 c ; etc.

⁷ Herodot. i. 22 ; Aristoph. *Ach.* 989.

⁸ Demosth. c. *Theocr.* 37.

εἰρήνη, ραχ. A treaty of peace in the strict sense was termed *εἰρήνη*,¹ the Latin *pac.*

διαλύσεις. A treaty of peace or pacification concluded on the cessation of civil discord was usually called a *διαλύσεις*,² which, as a rule, included a proclamation of amnesty, *ἀμνηστία*.

ἐκεχειρία. In reference to treaties and conventions arising more directly out of war relationships, there were, as distinct from a definite treaty and sometimes as preliminary to it, the suspension of arms, *ἐκεχειρία*³ (literally, holding of hands, *χείρ*), or *ἀνοχαί* (in the plural, like the corresponding Latin *induciae*); and the solemn truce, *σπονδαί*, which, apart from its application in actual warfare, is that concluded during, or in anticipation of, the Olympic games or other national or international festivals,—*αἱ Ὀλυμπικαὶ σπονδαί*.⁴ In this respect it practically amounted, therefore, to a general treaty of neutrality for the time being.⁵ This word is sometimes also used with the meaning of formal document, or treaty,—*εἴρηται ἐν ταῖς σπονδαῖς*.⁶

Difference
between
εἰρήνη
and
σπονδαί.

Andocides draws a certain distinction between *εἰρήνη* (not *συνθήκη*, as Egger⁷ says, which, of course, is a mere oversight) and *σπονδαί*. Speaking of the peace concluded with Lacedaemon, which was alleged by many to have brought about the establishment of the Thirty, and death and exile to many Athenians, he says that all those who speak in this manner do not reason precisely; for peace (*εἰρήνη*) and treaty (*σπονδαί*) are very different terms. 'Peace' is made on the basis of equality; but a 'treaty' is entered into when on the termination of a war the victor concludes with the vanquished on the terms demanded by the former. And it was by means

¹ Aeschin. *De fals. legat.* 77; Andoc. *De pace*, 8. 17.

² Demosth. *In Midiam*, 119: ... ἡξίου δὲ καὶ πρὸς ἐμὲ αὐτῷ ... γίνεσθαι τὰς διαλύσεις.

³ Thuc. iv. 58, 117; v. 26, 32; Xenoph. *Hellen.* iv. 2, 16.

⁴ Thuc. v. 49.

⁵ Plut. *Lycurg.* 1.

⁶ Thuc. i. 35.

⁷ *Op. cit.* p. 12, footnote.

of such a 'treaty' that the Lacedaemonian conquerors had made terms with the Athenians.¹

The words *σπονδαί* and *sponsio* seem to be cognate. *σπονδαί* and *sponsio*. Egger² says Gaius denies their kinship either in respect of their meaning or of their etymology. In point of fact, Gaius speaking of the formula 'dari spondes? spondeo,' and of its exclusive applicability to Roman citizens, says merely that it cannot be appropriately expressed in Greek, though, he adds, the term is said to have a Greek origin. "Spondeo adeo propria civium Romanorum est, ut ne quidem in Graecum sermonem per interpretationem proprie transferri possit, quamvis dicatur a Graeca voce figurata esse."³

In the treaty between Argos and Lacedaemon, according to the text given by Thucydides, we find the words *σπονδαί* and *συμμαχία* (*symmachy*) used as practically synonymous.⁴

A treaty supplementing, modifying, or rectifying a previous treaty or peace was described as *ἐπανόρθωσις* *ἐπανόρθωσις τῆς εἰρήνης* (or *συνθήκης*).

A convention between two or more States establishing a reciprocity of civic rights, on the basis of a greater or lesser equality, was an *ισοπολιτεία*,⁵—a term which has a somewhat wider significance than the Latin *foedus*. (*ισοπολιτεία* and *foedus*.) (The confederacy or league with interchange of civic rights was called *συμπολιτεία*.)⁶

There were also the *συμμαχία*,⁷ offensive and defensive

¹ *De pace*, II: ὅποσοι οὖν ταῦτα λέγουσιν, οὐκ ὀρθῶς γινώσκουσιν· εἰρήνη γὰρ καὶ σπονδαὶ πολὺ διαφέρουσι σφῶν αὐτῶν· εἰρήνην μὲν γὰρ ἐξ ἴσου ποιοῦνται πρὸς ἀλλήλους ὁμολογήσαντες περὶ ὧν ἂν διαφέρωνται· σπονδὰς δ', ὅταν κρατήσωσι κατὰ τὸν πόλεμον, οἱ κρείττους τοῖς ἡττοσιν ἐξ ἐπιταγμάτων ποιοῦνται.

² *Op. cit.* p. 12, footnote: "Quant à la *sponsio* des Latins, Gaius lui-même nous avertit qu'elle ne se rattache, ni pour le sens ni pour l'étymologie, au grec σπώνδή."

³ Gaius, iii. 93.

⁴ v. 78.

⁵ *Corp. inscrip. Graec.* ii. p. 410; Polyb. xvi. 26.—Cf. *supra*, pp. 141 *seq.*

⁶ Cf. Polyb. ii. 41. 12; iii. 5. 6.—Cf. *supra*, p. 144.

⁷ Herodot. v. 63, 73.

ἐπιμαχία. alliance for war and peace; and the *ἐπιμαχία*,¹ military alliance mainly for defensive purposes. The *συμμαχία* was a designation of lesser extent than the *συνθήκη*, which is shown by an epigraphic passage—[ἐν ταῖς] *γινόμεναις συνθήκαις συμμαχίαν πρὸς*. . . .² Sometimes the *συμμαχία* was a separate engagement supplementary to the treaty of peace.³

σύμβολα. The *σύμβολα*⁴ (used in the plural form,—the singular *σύμβολον*⁵ also meaning a convention or treaty) was an international agreement by which the signatory States engaged to ensure a mutual protection of commerce, or otherwise regulated commercial relationships, and frequently provided for the establishment of neutral tribunals to hear disputes arising out of such intercourse.

Kinds of treaties, etc., in Rome.

International relationships according as these were treaties or not.

The character of the international relationships of Rome with other peoples, particularly in the later period of her history, varied according as there existed or did not exist express conventions between them. If there were no treaties of any kind with any particular community, then the Romans conceived that the law of nations, as generally understood, or rather as they themselves understood it, had not full applicability to that nation. (It is well to point out again that this attitude, however, prevailed rather at the time of Rome's political supremacy and rapid imperial expansion.) In theory, the rights conferred by international law would not therefore be necessarily extended to such a community. There could not then be strictly any diplomatic relationships therewith by the interchange of ambassadors, no negotiations in peace, none of the usual

¹ Thuc. i. 44.

² Corp. *inscrip. Graec.* no. 127.

³ Plut. *Nicias*, 10: Τῇ εἰρήνῃ τὴν συμμαχίαν ὥσπερ κράτος καὶ δεσμὸν ἐπιθεῖναι.

⁴ Cf. *supra*, pp. 198 *seq.*

⁵ Polyb. xxiv. 1. 2; xxxii. 17. 3.—*Συμβολή* is also found, but more rarely (cf. Arist. *Rhet.* i. 4, 11), and likewise *συμβολά*, which appears in a Doric fragment published in *Philopatris*, Athens, July, 1859.

relaxations in war. In case of war this class of individuals were not, at least from a theoretical point of view, regarded as 'regular' enemies,—“hi hostes quidem non sunt.”¹ Consequently they could be enslaved, and their property seized as ‘res nullius’; and, further, the rules of *postliminium* might be extended to them even in time of peace,—“in pace quoque postliminium datum est.”² Whatever concessions were at any time granted, whatever relaxations were made—for actual practice did not by any means always follow the stringent theory—they were granted or made as favours, induced by generous or humane sentiments, and not necessarily through the force of any legal obligation. The moral consciousness, as engendering principles of equity, was ever an invaluable supplement to, and correction of, the juridical consciousness, as engendering positive systems of legislation.

Further, the conclusion of treaties and the maintenance of regular negotiations were conceived by the Romans to be possible only with communities properly organized, on a legal basis, and for the common good of the respective States. Such relationships were not thought possible with mere conglomerations of individuals, existing without a determinate polity.³ It is in accordance with this conception that Cicero defines a State: “Est igitur Respublica, res populi; populus autem non omnis hominum coetus, quoquo modo congregatus, sed coetus multitudinis iuris consensu et utilitatis communione sociatus.”⁴

Treaties concluded only with duly organized States.

In all these matters, however, a strict reciprocity of treatment was admitted in pursuance of the nature of the international relationships that prevailed at any given time. “Quod autem ex nostro ad eas pervenit illorum fit. . . . Idemque est, si ab illis ad nos aliquid

Reciprocal treatment.

¹ *Dig.* xlix. 15 (de captiv.), 5. 2.

² *Ibid.*

³ Cf. *supra*, p. 110.

⁴ *De Rep.* i. 25; cf. *Philipp.* iv. 5, 6; *Dig.* xlix. 15 (de captiv.), 24.

perveniat.”¹ So that, for example, where a treaty existed with a duly organized community, the ‘*ius postliminii*’ had no validity in time of peace either in the case of that community or in that of Rome.²

Pacific
relationships
of Rome,—
kinds.

The pacific relationships of Rome, in her later history, may be arranged under a twofold classification, thus :

(a) Relationships of alliance : in reference to states with which there existed ‘*amicitia*,’³ ‘*hospitium publicum*,’⁴ ‘*societas*,’ or a ‘*foedus*.’⁵

(b) Relationships of dependence : in reference to ‘*municipia*,’⁶ ‘*coloniae*,’⁷ ‘*provinciae*.’

Foedus and
pax.

The *foedus*, as a solemn treaty of peace (*pax*), adjusted the future relationships of belligerent states on the termination of hostilities ;—that is to say, when the immediate consequence of the war was not merely a ‘*deditio*’ (absolute surrender) of the conquered nation.

Indutiae.

The *indutiae*, in the strict sense, was a truce or armistice arranged for varying periods of duration according to the nature of the circumstances involved. This term has a somewhat analogous meaning in Roman private law, where it was used to express the respite granted by creditors to their debtors.⁸

Sponsio.

The *sponsio* was a covenant entered into by a general, usually on his own authority, engaging to secure a ratification by his government of the terms to which he has consented.⁹

International agreements relating to war (other than the *sponsiones*) will be more fully considered later.¹⁰

Binding force
of international
conventions.

It has been held by some writers that international conventions were conceived by the Romans as possessing

¹ *Dig.* xlix. 15 (de captiv.), 5. 2.

² Cf. *supra*, p. 110.

³ Cf. *supra*, p. 222.

⁴ Cf. *supra*, p. 221.

⁵ Cf. *supra*, p. 240, as to rights allowed to Latin peregrins by treaties.

⁶ Cf. *supra*, p. 254.

⁷ See *infra*, chap. xix. *ad fin.*

⁸ Cf. *Iust. Cod.* vii. 71 (qui bonis cedere possunt), 8,—where the law speaks of “*quinquennales indutias*.”

⁹ Cf. *supra*, pp. 369 *seq.*

¹⁰ See chap. xxv.

no strictly legal binding force. Thus Mommsen, for example, compares them to the 'pacta nuda' (or 'nudae pactiones') of private law, which, incapable of producing a 'civilis obligatio,'¹ and imposing only a 'naturalis obligatio,' were not directly enforceable at law. And this he does on the ground that the absence of a clearly defined sanction made their execution depend on the option of the engaging parties. From the standpoint of purely positive law, private contracts, no doubt, engendered superior obligations, in the sense of being more directly and more readily enforceable by definite measures; but this fact did not necessarily involve a nullification of international obligations, nor did it of necessity even impart to international agreements a flimsy or precarious character. In a sense it may be said that they assumed an intermediate position between perfect contracts and nude pacts, and were not at all wholly deprived of a juridical significance. For if the fundamentally legal nature of such compacts were not really recognized by the Romans, all the provisions relating thereto found in the Codes, all the statements and detailed reports of the ancient writers, particularly so with regard to the indispensable procedure and formalities so frequently insisted on, would amount to a mere chimaera or to a huge hypocrisy. To assert the one would be nothing less than a self-stultification, and to maintain the other would be a deliberate rejection of palpable and indefeasible evidence.

Were treaties
nude pacts?

Mommsen's
view examined.

The records of ancient treaties as seen in the reports of historians and other writers, and also in epigraphic documents, show an immense variety of subjects therein dealt with. From previous considerations it is obvious that the conclusion of treaties was a practice more frequent among the Greeks than among the Romans; so that the greater portion of the subjects specified below have reference to the former. The following matters may be mentioned, not by way of a complete

Subjects in
treaties.

¹ Dig. ii. 14. 7. 4: "... Nuda pactio obligationem non parit."

list, but simply to indicate the most usual substance of diplomatic relationships and the extremely varied character of international intercourse. There were treaties relating to religion ; friendship ; public hospitality ; alliance, either for both peace and war, or only for war ; alliance, either on an equal or an unequal footing ; confederations of various States, sometimes with the avowed intention of maintaining them in perpetuity ; establishment of councils for the same ; appointment of the commander of their united armies ; interchange of civic rights, partial or practically entire ; right of asylum ; protection and restoration of temples ; exchange of embassies, and inviolability of ambassadors and heralds and other diplomatic functionaries in peace and in war ; reception, expulsion, and surrender of fugitive criminals or other refugees ; return of runaway slaves ; extradition generally ; piracy ; treaties for terminating disputes by pacific methods, such as arbitration, mediation, lot ; regulation as to boundaries or disputed territories ; treaties of commerce, stipulating freedom of maritime intercourse ; regulation of reprisals ; special immunities from reprisal of certain individuals in time of war ; determination of the competence of different jurisdictions, and regulating certain conflicts of different legal systems ; sale, cession, or donation of territories ; government loans ; balance of power ; treaties as to the liberty and independence of a people that had liberated itself from another country's yoke ; treaties between colonists and the mother country, or between colonists and the original inhabitants of the colonized territory ; treaties of peace in the strict sense, and sometimes provisions for perpetual peace ; armistice, truce, and their periods of duration ; truce for sacred festivals and athletic games ; capitulation ; restoration of captured territory ; prizes ; war indemnity ; hostages ; ransom, exchange, and liberation of prisoners ; burial of dead ; passage or retreat of an army over neutral territory ; etc., etc.¹

¹ Cf. Dumont, *Corps diplomatique*, suppl. t. i. pt. i. pref. pp. x-xii ; Barbeyrac, *op. cit.* vol. i. *passim*.

In Greece most of the diplomatic functionaries already mentioned¹ took part in one or other stage of the negotiations relating to the conclusion of treaties,—the heralds (*κήρυκες*, who had played an especially important part in the heroic and early age) in the preliminary proceedings, and the plenipotentiaries (*αὐτοκράτορες*) in the main transactions. The consent of the council and of the assembly of the people was necessary.

Functionaries
in concluding
treaties.
In Greece.

In Rome treaties were entered into by a special embassy, or by the commander in the field (*sponsio*), or by the consul (especially so in the later period). Treaties usually contained the proviso, 'subject to the ratification of the Roman people,'—thus, in Polybius' phrase, *ἐὰν καὶ τῷ δήμῳ τῶν Ῥωμαίων συνδοκῇ*.² This is seen, for example, in the treaty made by Barcas and Lutatius in 242 B.C., putting an end to the first Punic war. According to the text of Polybius, it runs to this effect: "Friendship is established between the Carthaginians and the Romans on the following terms, provided always they are ratified by the Roman people. The Carthaginians shall evacuate the whole of Sicily; they shall not wage war upon Hiero, nor take up arms against the Syracusans or their allies. The Carthaginians shall restore to the Romans all prisoners without any ransom. The Carthaginians shall pay the Romans in twenty years an indemnity of 2,200 Euboic talents of silver"³ [*i.e.* about half a million sterling]. When, however, the treaty was sent to Rome, the people refused to ratify it, but despatched ten commissioners to investigate the affair. On their arrival they made

Treaty of
242 B.C.

Sanction of
people
necessary.

¹ See *supra*, pp. 304 *seq.*

² Cf. i. 62.

³ Polyb. i. 62 : *ἐπὶ τοῖσδε φιλίαν εἶναι Καρχηδονίοις καὶ Ῥωμαίοις, εἰάν καὶ τῷ δήμῳ τῶν Ῥωμαίων συνδοκῇ. ἐκχωρεῖν Σικελίας ἀπάσης Καρχηδονίους, καὶ μὴ πολεμεῖν Ἱέρωνι μηδ' ἐπιφέρειν ὄπλα Συρακοσίοις μηδὲ τῶν Συρακοσίων συμμάχοις. ἀποδοῦναι Καρχηδονίους Ῥωμαίοις χωρὶς λύτρων ἅπαντας τοὺς αἰχμαλώτους. ἀργυρίου κατενεγκεῖν Καρχηδονίους Ῥωμαίοις ἐν ἑτεσὶν εἴκοσι διωχίλια καὶ δικόσια τάλαντα Εὐβοϊκά.*

no radical change in the general terms of the treaty, but merely increased the severity of the various conditions. Thus the time arranged for the payment of the money was reduced to half, a sum of a thousand talents was added to the indemnity, and the evacuation of Sicily was extended to all the islands lying between Sicily and Italy.¹

In Carthage
authority of
people
required.

In Carthage also the sanction of the people was indispensable in the case of treaties entered into by her ambassadors. On the fall of Saguntum envoys were sent to the Carthaginians to demand the surrender of Hannibal, and, if they should refuse, to declare war. The case for the Carthaginians, stated by their representatives, was grounded on various pleas, and was introduced by the following observation: "Passing over the treaty alleged to have been made with Hasdrubal, as not having ever been made, and, if it had, as not being binding on the people because made without their consent,—and on this point they quoted the precedent of the Romans themselves who, in the Sicilian war, repudiated the terms agreed upon and accepted by Lutatius, as having been made without their sanction,"² etc.

In Rhodes, the
admiral usually
obtained full
power.

In Rhodes the admiral was vested with the full power to conclude conventions. On the astute policy of the Rhodians who tried to excuse themselves for their conduct towards Rome by sending a compli-

¹ Polyb. i. 63 : τούτων δ' ἐπανενεχθέντων εἰς τὴν Ῥώμην οὐ προσεδέξατο τὰς συνθήκας ὁ δῆμος, ἀλλ' ἐξαπέστειλεν ἄνδρας δέκα τοὺς ἐπισκεψομένους ὑπὲρ τῶν πραγμάτων· οἱ καὶ παραγενόμενοι τῶν μὲν ὄλων οὐδὲν ἔτι μετέθηκαν, βραχέα δὲ προσεπέτειναν τοὺς Καρχηδονίους· τὸν τε γὰρ χρόνον τῶν φόρων, ἐποίησαν ἡμισυν, χίλια τάλαντα προσθέντες, τῶν τε νήσων ἐκχωρεῖν Καρχηδονίους προσεπέταξαν ὅσα μεταξὺ τῆς Ἰταλίας κείνται καὶ τῆς Σικελίας.

² Polyb. iii. 21 : τὰς μὲν οὖν πρὸς Ἀσδρούβαν ὁμολογίας παρεσιῶπων. ὥς οὔτε γεγενημένης, εἴ τε γεγόνασιν, οὐδὲν οὕτως πρὸς αὐτοὺς διὰ τὸ χωρὶς τῆς σφετέρας πεπραχθαι γνώμης. ἐχρῶντο δ' ἐξ αὐτῶν Ῥωμαίων εἰς τοῦτο παραδείγματι· τὰς γὰρ ἐπὶ Λουτατίου γενομένης συνθήκας ἐν τῇ πολέμῳ τῇ περὶ Σικελίας, ταύτας ἔφασαν ἤδη συνωμολογημένας ὑπὸ Λουτατίου μετὰ ταῦτα τὸν δῆμον τῶν Ῥωμαίων ἀκύρους ποιῆσαι διὰ τὸ χωρὶς τῆς αὐτοῦ γενέσθαι γνώμης.

mentary crown through an embassy under Theaetetes, the navarch, charged to effect an alliance with Rome, Polybius comments thus : They proceeded in this way because, if the embassy failed by an adverse answer at Rome, they desired the failure to take place without a formal decree having been passed, seeing that the attempt was made solely on the initiative of the navarch, who has a legal right to act in such a case.¹ Similarly, in 198 B.C., Acesimbrotus, the navarch, was despatched by Rhodes as a commissioner to the congress at Nicaea in Locris in order to discuss relationships with Philip.² In matters of a serious nature, however, the sanction of the people was essential to impart validity to the transaction of the navarch.³

An early account of the conclusion of a compact and of the ceremonial indispensable thereto is given in the *Iliad*. It was a solemn agreement entered into by the Trojans and the Argives with regard to the combat for Helen between Menelaus and Alexander. First of all the herald made an announcement in the city of the duel, and of the preliminaries that were about to ensue, and brought two lambs, some wine in a goat-skin bottle, a bowl, and golden cups. When all were assembled, "the lordly heralds brought together the faith-ensuring pledges of the gods, and mingled the wine in a bowl, and poured water over the hands of the princes."

Ceremonial in earlier treaties.

In Greece.

Preliminary announcement by the herald.

... ἀτὰρ κήρυκες ἀγανοὶ
ὄρκια πιστὰ θεῶν σύναγον, κρητῆρι δὲ οἶνον
μίσγον, ἀτὰρ βασιλεῦσιν ὕδωρ ἐπὶ χεῖρας ἔχευαν.⁴

Then Atreides cut off the hair from the heads of the lambs, which was distributed by the heralds amongst the chiefs of the Trojans and Achaeans. Atreides raising his hands then offered up this prayer : " Father

Invocation to the gods.

¹ Polyb. xxx. 5 : ... τὴν γὰρ ἐξουσίαν εἶχε ταύτην ναύαρχος ἐκ τῶν νόμων.—Cf. Liv. xlv. 25.

² Polyb. xviii. 1.

³ Polyb. xxx. 1 ; Liv. xlv. 5.

⁴ *Iliad*, iii. 268-270.

Zeus, that rulest from Ida, most glorious, most mighty, and thou Sun that beholdest all things, and hearest all things, and ye Rivers and thou Earth, and ye that in the underworld punish men deceased, whosoever has taken a false oath; be ye witnesses, and watch over the faith-ensuring pledges."

Ζεῦ πάτερ, Ἰδηθεν μεδέων, κύδιστε, μέγιστε,
'Ἡέλιος θ', ὃς πάντ' ἐφορᾷς καὶ πάντ' ἐπακούεις,
καὶ Ποταμοὶ καὶ Γαῖα, καὶ οἱ ὑπέρθε καμόντας
ἀνθρώπους τίνυσθον, ὅτις κ' ἐπίορκον ὁμόσση,
ὑμεῖς μάρτυροι ἔσθε, φυλάσσετε δ' ὄρκια πιστά.¹

Recital of
conditions.

Next, the conditions of the combat were stated,² the throats of the lambs were cut, followed by a libation of wine, and an imprecation recited by many on both sides: "Zeus, most glorious, most mighty, and ye other immortal gods! Whosoever shall first commit wrong contrary to their pledges, may their brains and their children's be dispersed on the ground, like this wine, and may their wives prove faithless."

Imprecation.

Ζεῦ κύδιστε, μέγιστε, καὶ ἀθάνατοι θεοὶ ἄλλοι,
ὀππότεροι πρότεροι ὑπὲρ ὄρκια πημήνεια,
ᾧδὴ σφ' ἐγκέφαλος χαμάδις ῥέοι, ὥς ὅδε οἶνος,
αὐτῶν, καὶ τεκῶν, ἄλοχοι δ' ἄλλοισι μγείην.³

In the following book of the *Iliad*, Agamemnon is represented as saying to Menelaus, holding him by the hand: "Beloved brother, to thy death, meseemeth, pledged I these oaths, in setting thee forward alone to fight for the Achaeans against the Trojans, since the Trojans have wounded thee, and trampled upon the trusty oaths. Yet in no wise is the pledge in vain, nor the blood of the lambs, and the pure libations, and the right hands of fellowship wherein we placed our trust."

Φίλε κασίγνητε, θανάτῳ νύ τοι ὄρκι' ἔταμνον,
οἷον προστήσας πρὸ Ἀχαιῶν Τρῳσὶ μάχεσθαι.
ὥς σ' ἔβαλον Τρῶες, κατὰ δ' ὄρκια πιστὰ πάτησαν.
οὐ μὲν πως ἄλιον πέλει ὄρκιον, αἱμὰ τε ἀρνῶν,
σπονδαὶ τ' ἀκρητοὶ καὶ δεξιαί, ἧς ἐπέπιθμεν.⁴

¹ *Iliad*, iii. 276-280

² *Iliad*, iii. 281-291.

³ *Iliad*, iii. 298-301.

⁴ *Iliad*, iv. 155-159.

Later, Agamemnon, urging on the Argives, says : " Ye Argives, relax not in any wise your impetuous ardour ; for father Zeus will be no protector of liars ; but as they were the first to transgress against the oaths, so shall their own tender flesh be devoured by the vultures."

Zeus—no protector of perjurers.

*Ἀργεῖοι, μήπω τι μεθίετε θούριδος ἀλκῆς·
οὐ γὰρ ἐπὶ ψεύδεσσι πατήρ Ζεὺς ἔσσει' ἀρωγός·
ἀλλ' οἵπερ πρότεροι ὑπὲρ ὅρκια δηλήσαντο,
τῶν ἦτοι αὐτῶν τέρενα χροῖα γῦπες ἔδονται.¹*

From the above it is seen that in the Greek heroic age the main proceedings of the ceremonial adopted in the conclusion of a treaty were : (1) a preliminary announcement by the heralds, (2) an invocation to the gods to bear witness to the transaction, (3) a declaration of oath, (4) a recital of the conditions of the engagement, (5) the offering of a sacrifice, (6) a libation of wine, (7) joining of hands, and (8) the utterance of an imprecation on those who would, contrary to their oaths, violate the compact.

Main proceedings in the ceremonial.

This ritual is found substantially amongst the nations of antiquity in general. With the Phoenicians and the Israelites, for example, the solemn imprecation of divine vengeance on violators of covenants formed the most important part of the procedure. The Carthaginians also swore by the gods of their fathers, . . . τοὺς θεοὺς τοὺς πατέρας.² In China there were likewise elaborate formalities in connection with the signing of a treaty, including solemn confirmation by oath, mingling of the blood of the signatory parties in a cup of wine, laying their hands on the head of an ox to be sacrificed, and the usual imprecation. Thus in a treaty between the Prince of Cheng, and a coalition of princes who invaded his territory, 544 B.C., after the preamble and the recital of the provisions, the conclusion was to this effect : " We engage to maintain inviolate the terms of the foregoing agreement. May the gods of

Similar ritual amongst ancient peoples in general. Phoenicians, Israelites, Carthaginians.

The ancient Chinese.

¹ *Iliad*, iv. 234-237.

² *Polyb.* iii. 25.

the hills and the rivers, the spirits of former emperors and dukes, and the ancestors of our seven tribes and twelve States watch over its fulfilment. If anyone prove unfaithful may the all-seeing gods smite him, so that his people shall forsake him, his life be lost, and his posterity cut off."¹

Modern
uncivilized
races.

It is worthy of note that amongst the uncivilized races of to-day the formal oath, imprecation, and sacrifice—sometimes of human victims—are the invariable accompaniments of the conclusion of treaties.²

In historic
Greece.

In more historic times in Greece there were, apart from treaties, a similar oath and imprecation in reference to the Amphictyonic proceedings. Thus the Cirrhoeans having committed an offence against the temple of Delphi and the Amphictyons, the latter were commanded by the oracle to ravage the country of the delinquents and enslave them. Solon accordingly moved a resolution to this effect. Cirrha was then levelled (585 B.C.), and the territory consecrated to the god, by a 'mighty oath,' followed by a supplication and solemn curse: "If anyone transgress this, whether city or individual or tribe, let him be accursed of Apollo and Artemis and Leto and Athene; . . . neither may the offenders' land bear fruit, nor their wives bring forth children like unto their parents, but monsters, nor their herds yield increase after their kind; and may they suffer confusion in war, and trials and councils, may they be exterminated themselves, and their houses and their race; and may they never sacrifice acceptably to Apollo or Artemis, or Leto, or Athene, nor receive their sacrifices at their hands."³

Importance of
the oath.

¹ Martin, *loc. cit.* p. 73.

² Cf. Ratzel, *Völkerkunde*, vol. ii. pp. 448, 451.

³ Aeschines, *c. Ctesiph.* 110: καὶ οὐκ ἀπέχρησεν αὐτοῖς τοῦτον τὸν ὄρκον ὁμόσαι, ἀλλὰ καὶ προστροπὴν καὶ ἄρὰν ἰσχυρὰν ὑπὲρ τούτων ἐποιήσαντο. γέγραπται γὰρ οὕτως ἐν τῇ ἁρῇ, εἴ τις τάδε παραβαῖνοι ἢ πόλις ἢ ἰδιώτης ἢ ἔθνος, ἐναγὴς ἔστω τοῦ Ἀπόλλωνος καὶ τῆς Ἀρτέμιδος καὶ Διτοῦς καὶ Ἀθηνᾶς Προνοίας. . . . καὶ ἐπεύχεται αὐτοῖς μήτε γῆν καρποὺς φέρειν, μήτε γυναῖκας τέκνα τίκειν γονεῦσιν

In Herodotus¹ we find the formula of the oath that was taken by the united Greeks in view of the Persian invasion.

Treaties and contracts in general were in Greece, as in other ancient countries, conceived to be under the protection of the 'gods. The divine sanction was explicitly recognized in the solemn oath. Treaties usually contained provisions for the reciprocal administration of the oath, and often indicated the personages who were to take it and those who were to witness it. A violation of the oath was not only a ground for war, but the culprit (frequently along with his family and descendants) was deemed to be inevitably subject to the dire retribution of the gods.² Indeed, the gods themselves were punished for any perjury they committed.³

Treaties and contracts under divine guardianship. In Greece.

It may in truth be said that the oath is, in a certain sense, the underlying basis of the whole body of the ancient law of nations. And this will be further exemplified in the consideration of the sacred element in Roman treaties.

The oath—the basis of the ancient law of nations.

As in the case of the other countries of antiquity, in Rome treaties were deemed to be under the vigilant guardianship of the gods, so that any infraction thereof was regarded not only as an offence against the law of nations, but also an offence against divine law. Rome had her Jupiter Fidius, as Greece had her Ζεὺς Πίστιος.⁴

In Rome.

Jupiter Fidius.

Ζεὺς Πίστιος.

ἐοικότα, ἀλλὰ τέρατα, μήτε βροσκήματα κατὰ φύσιν γονὰς ποιῆσθαι, ἤτταν δὲ αὐτοῖς εἶναι πολέμου καὶ δικῶν καὶ ἀγορῶν, καὶ ἐξώλεις εἶναι καὶ αὐτοὺς καὶ οἰκίας καὶ γένος τὸ ἐκείνων. καὶ μήποτε ὁσῶς θύσειαν τῷ Ἀπόλλωνι μηδὲ τῷ Ἀρτέμειδι μηδὲ τῷ Διὶ τοῖ μηδ' Ἀθηνᾷ Προνοίᾳ, μηδὲ δέξαιντο αὐτοῖς τὰ ἱερά. (In this passage the constantly recurring word *φησί* has been omitted for convenience' sake.)—Cf. *De fals. legat.* 115, as to the oath taken by the members of the Amphictyonic league.

¹ vii. 132 : τὸ δὲ ὄρκιον ὧδε εἶχε, ὅσοι τῷ Πέρσῃ ἔδοσαν σφέας αὐτοὺς Ἑλλήνες ἰόντες, μὴ ἀναγκασθέντες, καταστάντων σφι εἰς τῶν πρηγμάτων, τούτους δεκατεῦσαι τῷ ἐν Δελφοῖσι θεῷ.

² Herodot. vi. 86.

³ Hesiod, *Theog.* 784-795.

⁴ Dion. Hal. iv. 58.

Janus is said to have been the protector of alliances, his double face symbolizing the two peoples united by the treaty of peace.¹

Early Italic
ceremonial.

In the twelfth book of the *Aeneid*, we read of Aeneas suggesting a treaty with Latinus on a basis of equality, and he mentions certain conditions thereof. Whereupon Latinus, looking towards the sky and extending his hand to heaven ('suspiciens caelum tenditque ad sidera dextram'), says: "By these same I swear, O Aeneas, by Earth, Sea, Sky, and the twin brood of Latona and Janus the double-facing, and the might of nether gods and grim Pluto's shrine; this let our Father hear, who seals treaties with his thunderbolt. I touch the altars, I take to witness the fires and the gods between us; no time shall break this peace and truce in Italy, howsoever fortune fall; nor shall any force turn my will aside, not if it dissolve land into water in turmoil of deluge, or melt heaven in hell. . . ."²

After this solemn declaration the consecrated beasts were slain over the flames, their entrails torn out, and the altars piled with laden chargers.³

Foedus—and
fetials.

The religious aspect of the Roman *foedus* is manifest through its necessary connection with the fetial magistrates, who were functionaries of a certain sacred character. In fact, as Fusinato maintains, *foedus* and

¹ Servius, *Ad Aen.* xii. 198.

² Trans. by J. W. Mackail (London, 1908), p. 278.

Aeneid, xii. 197-205:

"haec eadem, Aenea, terram mare sidera iuro
Latonaeque genus duplex Ianumque bifrontem
vimque deum infernam et duri sacraria Ditis;
audiat haec genitor, qui foedera fulmine sancit.
tango aras, medios ignis et numina testor;
nulla dies pacem hanc Italidis nec foedera rumpet,
[quo res cumque cadent; nec me vis ulla volentem
avertet, non si tellurem effundat in undas
diluvis miscens caelumque in Tartara solvat;]"

³ *Ibid.* 213-215:

"tum rite sacratas
in flammam iugulant pecudes et viscera vivis
cripiunt cumulantque oneratis lancibus aras."

fetial are (apart from their alleged etymological kinship) essentially inseparable conceptions,—“foedus e feziali sono due concetti che nella loro purezza non si possono, a quanto io credo, separatamente concepire.”¹ Hence this writer’s definition of *foedus*, based on that of Osenbrueggen,² and completed by the inclusion of the ceremonies and agency of the fetials, is formulated as a public convention between the Roman people and another nation respecting the conclusion of war and the determination of the conditions of peace by the sanction and authority of the senate and the people, and effected by fetial solemn ceremonial;—“conventio publica inter populum Romanum et alium populum de bello finiendo et pacis conditionibus constituendis auctoritate et iussu S.P.Q.R. cum fetialibus ceremoniaque solemnī facta.”³ This statement duly emphasizes the relationship between the *foedus* and the fetials; but it is a definition of only one kind of *foedus* (as will appear from previous considerations) since it excludes various other transactions which were within the sphere of *foedera*.

Definition of
foedus.

The fundamental notions of the Greeks and of the Romans regarding the significance of treaties and their sacred character are very closely allied. Thus, in Greek, the word *πίστις* has, in an abstract sense, the meaning of honesty, good faith,⁴ thus corresponding to the Latin *fides*; secondly (like τὸ πιστόν), in a concrete sense, it signifies an assurance, a pledge of good faith, a treaty, corresponding to the Latin *foedus*, as embodying *fides*. In reference to the second meaning, we find *πίστις* frequently associated with *ὄρκος*, an oath,⁵ and also with *ὄρκια*, in the sense, on the one hand, of the offerings and other rites used at the making of a

Greek and
Roman
conceptions
allied.

¹ *Dei feziali e del diritto feziale*, loc. cit. p. 547.

² E. Osenbrueggen, *De jure belli et pacis Romanorum* (Leipzig, 1836), p. 75.

³ *Dei feziali e del diritto feziale*, loc. cit. p. 547.

⁴ Cf. Soph. *Oed. Col.* 611: θνήσκει δὲ πίστις, βλαστάνει δ' ἀπιστία; Herodot. viii. 105.

⁵ Thus, Aristoph. *Lysist.* 1185: ὄρκους καὶ πίστιν δοῦναι.

solemn oath or treaty, and, on the other, the solemn compact itself. So that *ῥρκια πιστὰ ταμεῖν*¹ (to conclude a treaty) answers to the Latin expression 'foedus ferire,' whilst *ῥρκια δηλήσασθαι*² means to violate a solemn treaty; and, indeed, *ῥρκια* is sometimes used in the sense of the victims sacrificed when the oaths are taken.³ The gods invoked at the taking of an oath, who guard its observance and punish its infraction, are described as, *ῥρκιοι θεοί*;⁴ and so we have *Ζεὺς ῥρκιος*,⁵ involving a conception which is thus closely related to that of *Ζεὺς Πίστιος*.

σπονδαί
and *spondeo*.

Again, the Latin *spondeo* is the Greek *σπένδω*, to pour a libation (the Latin 'libare'), hence (on account of this formality) to make peace, to conclude a treaty.⁶ Likewise, the *sponsio* is the *σπονδή*⁷ (drink-offering, 'libatio'), of which the plural, *σπονδαί* means a solemn treaty, a truce,⁸ being a later development of the *ῥρκια*. Thus, just as there is a kinship between the 'foedus' and the 'fetiales,' so there is a connection between the 'sponsio' and the oath. As Danz observes: "Es werde sich der Beweis führen lassen, dass die Sponsio der frühesten Zeit der formulirte promissorisches Eid war."⁹

In reference to the 'spondesne? spondeo' of the

¹ Cf. Herodot. ix. 92 : *πίστιν καὶ ῥρκια ποιεῖσθαι* (to enter into a treaty by exchanging assurances and oaths).

² *Iliad*, iii. 107; iv. 67; cf. iv. 155, 157 quoted *supra*, p. 386, n. 4.

³ Cf. *Iliad*, iii. 245, 269. ⁴ Thuc. i. 71, 78; Eurip. *Phoen.* 481.

⁵ Soph. *Phil.* 1324; Pausan. v. 24. 9.

⁶ Cf. Herodot. iii. 144; Aristoph. *Ach.* 199; Thuc. i. 18 : *τὰ μὲν σπενδόμενοι τὰ δὲ πολεμοῦντες*; and so *σπένδεσθαι τῇ πρεσβείᾳ* (to give assurances of safe-conduct to ambassadors).

⁷ Diod. iii. 71; cf. Festus, p. 329 : "Spondere Verrius putat dictum, quod sponte sua, id est voluntate, promittatur, deinde oblitus inferiore capite sponsum et sponsam ex Graeco dictam ait, quod ii *σπονδάς* interpositis rebus divinis faciant."

⁸ Cf. *Iliad*, iv. 159 : *σπονδαί τ' ἄκρητοι* (quoted above).

⁹ *Der sacrale Schutz*, p. 105; cf. *ibid.* pp. 102-106 on the subject generally.—Cf. the comment of Leist, *Gr.-Ital. Rechtsg.* p. 465, note q.

private law, Gaius¹ mentions as an approximate Greek equivalent—‘ὁμολογεῖς; ὁμολογῶ,’²—which indicates a transformation, to a large extent, of the significance of the terminology.

We find, then, on further analysis, that the concep-^{πίστις}
tions of ‘fides’ (as embodied in the ‘foedus’) and ^{and fides.} ^{Numerous}
^{applications.} πίστις and ὅρκια (as embodied in the σπονδαί), are at the very foundation not only of ancient treaties in the strict sense, but of the whole range of Hellenic and Roman international relationships, in peace or war. Festus ascribes the intrinsic significance of ‘foedus’ to its all-important factor, ‘fides’; “foedus... quia in foedere interponatur fides”;³ and Livy likewise emphasizes its relationship to ‘foedus,’ as well as to ‘amicitia’ and ‘societas’;—“in fidem venerunt... foedere ergo in amicitiam accepti”;⁴ “eo anno societas coepta est; in fidem populi Romani venisse.”⁵ Further applications of ‘fides’ and σπονδαί are found in reference to other institutions and transactions; for example, in the case of armistices and truces,—“fides indutiarum”;⁶ assurances of safe-conduct⁷ (as was pointed out in a footnote above),—σπένδεσθαι τῇ πρεσβείᾳ;⁸ engagements for the burial of those fallen in war,—“per indutias sepeliendi caesos potestas est facta,”⁹ or σπονδαὶ εἰς νεκρῶν ἀναίρεσιν,¹⁰ or τοὺς νεκροὺς ὑποσπόνδους ἀνειρεῖσθαι;¹¹ the release of prisoners,—ὑποσπόνδους ἀπέναι τοὺς αἰχμαλώτους;¹² agreements for

¹ Inst. iii. 93; cf. *supra*, p. 377.

² Cf. Demosth. *De corona*, 32: ὁμολόγησε τὴν εἰρήνην (he agreed to peace); Herodot. vii. 172: ἐπίστασθε ἡμέας ὁμολογήσειν τῷ Πέρσῃ.

³ § 84.

⁴ Liv. viii. 25.

⁵ Liv. viii. 27; cf. Liv. viii. 21; ix. 6; x. 45.

⁶ Liv. i. 30; ix. 40; xxx. 16, 25.

⁷ Liv. xxxviii. 9; xl. 49; etc.

⁸ Aeschin. c. *Ctesiph.* 63.

⁹ Liv. xxxviii. 2.

¹⁰ Cf. Thuc. iii. 24, 109; iv. 114: σπείσασθαι... ἡμέραν τοὺς νεκροὺς ἀνελίσθαι.

¹¹ Thuc. iv. 44.

¹² Cf. Plut. *Solon.* 9: πάντας ὑποσπόνδους ἀφήκεν.

extradition, for capitulation,—“in fidem consulis dicionemque populi Romani sese tradebant”;¹ “deditionis quam societatis fides sanctor erat”;² “non in servitutem sed in fidem tuam nos tradidimus”;³ and so on in various other cases.

Similarity of outward ceremonial of Greece and Rome.

Besides this analogy in the fundamental conceptions of Greece and Rome, there is also a similarity between the outward formalities introduced in concluding their solemn engagements; for example, in the use of the invocation to the gods to witness the proceedings and watch over the fulfilment of the mutual promises, in the administration of the oath, the sacrifice, the imprecation.

First treaty between Rome and Carthage.

Thus, in the first treaty between Rome and Carthage (509–8 B.C.), the Romans, as Polybius⁴ states, invoked Jupiter Lapis; and in a subsequent treaty Mars and Quirinus. Similarly, in the treaty between Hannibal and Philip V. of Macedon, 215 B.C., the oath was taken, says Polybius,⁵ in the presence of Zeus, Here, and Apollo; of the god of the Carthaginians, Hercules, and Iolaus; of Ares, Triton, Poseidon; of the gods that accompany the army, and the sun, moon, and earth; of rivers, harbours, waters; of all the gods who rule Carthage; of all the gods who rule Macedonia and the rest of Greece, of all the gods of war that are witnesses to the oath.

Formulas to invoke the gods.

In Livy we find several formulas which were used to invoke the attestation of the gods, and their punishment for any violation of oaths,—“adeste dii testes foederis et expetite poenas debitas simul vobis violatis nobisque per vestrum numen deceptis.”⁶

Imprecation.

With regard to the imprecation, and other proceedings, the first Roman treaty with Carthage affords an interesting example. The Commissioner (or

¹ Liv. xxxvii. 45; cf. xxxii. 2; xxxvii. 32.

² Liv. vi. 9.

³ Liv. xxxvi. 28.

⁴ iii. 25.

⁵ vii. 9.

⁶ Liv. vi. 29; cf. *ibid.* viii. 6: “crebram implorationem deum, quos testes foederum saepius invocabant consules.”

functionary, *ποιούμενος*, referring to the officiating fetial, the 'pater patratus'), writes Polybius, took a stone in his hand, and having taken the oath in the name of his country, concluded with these words: 'If I abide by this oath may he [Jupiter] bless me; but if I do otherwise in thought or act, may all others prosper in their countries, under their laws, in their livelihood, and preserve their household gods and tombs; may I alone be cast out, even as this stone is now.' And having uttered these words, he threw the stone from his hand.¹

Here there appears a certain difference between the Homeric ritual and the old Italic. The hurling of the stone symbolizes Jupiter's striking down of perjurers. Very frequently a pig was thus struck down, or sacrificed, by the fetial magistrate.² The gods, it was conceived, would strike down violators of oaths, just as the pig was there and then struck down ('ferire,' or 'icere,' or 'percutere'). Hence the expressions 'foedus ferire,' 'foedus ictum,' 'foedus percutere'; and Festus draws attention to the kinship between 'ferire' and the fetials,—“fetiales a feriendo dicti; apud hos enim belli pacisque faciendae ius est.”³ The Homeric *ὄρκια τέμνειν* (Attic *τέμνειν*, to cut up, to slaughter) corresponds to 'foedus ferire,' but in the case of the former expression the reference is rather to the sacrifice itself. As to the use of the pig, Pantaleoni points out that it represents the hunting life in the woods before the pastoral age, the stone representing the stone age,—from which conjecture he infers the distant antiquity of the ceremonial. Others assert that the pig was in ancient times held to

Difference between the Homeric ritual and the old Italic.

Symbolism.

Use of the pig.

¹ Polyb. iii. 25 : ... λαβὼν εἰς τὴν χεῖρα λίθον ὁ ποιούμενος τὰ ὄρκια περὶ τῶν συνθηκῶν ἐπειδὴν ὁμολογῇ δημοσίᾳ πίπτει, λέγει τάδε 'εὐορκοῦντι μὲν ποιεῖν τάγαθά· εἰ δ' ἄλλως διανοηθεῖν τι ἢ πράξαιμ, πάντων τῶν ἄλλων σφωρόμενων ἐν ταῖς ἰδίαις πατρίσιν ἐν τοῖς ἰδίους νόμοις ἐπὶ τῶν ἰδίων βίων ἱερῶν τάφων, ἐγὼ μόνος ἐκπέσοιμι οὕτως ὡς ὄδε λίθος νῦν.' καὶ ταῦτ' εἰπὼν ρίπτει τὸν λίθον ἐκ τῆς χειρός.

² Cf. Virgil, *Aeneid*, viii. 641 : "Et caesa iungebant foedera porca."

³ p. 91.

be a sacred animal ; and, again, that the figure of a pig was amongst the military standards.¹

Later
development
of treaties—
their
formalities.
In Greece.

In Greece the frequent negotiations between the various States, particularly during the Peloponnesian war, conduced to the rapid development of the art of treaty-making. Certain formalities became a recognized part of the procedure, and certain personages came to be regularly employed in the conducting of the multifarious transactions. Thus, at the beginning of his second book, Thucydides² says—as though the usage had become once and for all stereotyped—that thenceforward no overtures were inaugurated between the parties without the preliminary employment of heralds for the arrangement of the subsequent diplomatic intercommunication ; and so heralds, ambassadors, and their suites became regular functionaries.³ These were also usually accompanied by secretaries and draftsmen. Further, a definite and specially adapted style came to be employed for the recording of international transactions, in order to secure precision and conciseness, and avoid all possible ambiguity and obscurity ; and sometimes a certain technical terminology appears. Elaborate provisions were set out in an orderly and logical manner, to regulate clearly the legal relationships established, to secure their observance, and to provide for any infringements. This is shown in the several treaties given by Thucydides in his fifth book.⁴

Heralds.

Ambassadors.

Definite
language in
treaties.

Besides the numerous references to contemporary treaties in historians, like Thucydides, there are many in the orators, dramatic poets, and others.⁵

¹ Festus, *s.v.* *Porci* : “ Porci effigies inter militaria signa quintum locum obtinebat, quia confecto bello, inter quos pax fiebat, ex caesa porca foedere firmari solet.”

² ii. 1 and 2.

³ Thuc. iv. 118.

⁴ See *infra*, chap. xvii.

⁵ E.g. Eurip. *Suppl.* ; *Heraclea* ; *Phoen.* ; Aristoph. *Wasps*, 1268 *seq.* ; *Clouds*, 691 ; *Peace*, 454 *seq.* ; *Birds*, 1031 *seq.*, 1550 *seq.*, 1582 *seq.* ; *Acharn.* 54, 186 *seq.*—Cf. H. Weil, *De tragœdiarum graecarum cum rebus publicis conjunctione* (Paris, 1844), *passim*.

Unlike our modern diplomatic methods, negotiations were conducted publicly. Foreign ambassadors were received by the general assembly, of which each member had the right and the opportunity to take an active part in the transactions, and to make what suggestion he thought fit regarding any overtures that were made. Sometimes in cases of difficulty or emergency a private conference, to which the leading statesmen were delegated, was agreed upon instead of holding public deliberations. Secret treaties were not unknown in the diplomatic annals of Greece. Thus, when the Achaean league determined upon war with the Aetolians and applied to their allies for assistance, the Lacedaemonians, who had but recently been liberated by means of Antigonos and the generous zeal of the Achaeans, as Polybius observes, sent clandestine messages to the Aetolians, and arranged a secret treaty of alliance and friendship with them,—*διαπεμφόμενοι λάθρα πρὸς τοὺς Αἰτωλοὺς φιλίαν δι' ἀπορρήτων ἔθεντο καὶ συμμαχίαν*.¹

Negotiations
in public.

Sometimes,
in private
conferences.

Secret treaties.

We find in the extant texts of treaties, whether given by the historians and orators, or contained in epigraphic documents, that various dialects were used by the people of Greece in drawing them up. When the contracting parties spoke different dialects, each kept a copy drafted in its own dialect.²

The parties
retained copies
in their own
dialects.

Independent States enjoyed the use of a public seal,—*δημοσία σφραγίς*,—which is frequently referred to in inscriptions with regard to the execution of public acts.³ Livy likewise speaks of 'signatis tabulis publicis,' and other ancient writers make mention of forged seals, 'signa adulterina,' (but mainly in reference to private transactions).⁴

Public seal.

The full signatures of the delegates or other officials taking part in the transactions are also found appended

Signatures of
delegates.

¹ Polyb. iv. 16.

² Cf. Egger, *op. cit.* pp. 61, 62.

³ Cf. *Corp. inscrip. Graec.* nos. 2329, 2332, 2847, 3053, etc.

⁴ Cf. Cic. *Pro Cluent.* 14: "testamentum signis adulterinis obsignare."

to the documents; *ἔγραψα καὶ ἐσφράγισα*, says an inscription.¹

Record of
treaties.

The texts of treaties were usually engraved on bronze tablets or marble steles, and preserved in certain temples, or other specially appointed public places, under the protection of the gods. In Athens the Metroon (the temple of the mother of the gods) was a depository for State archives, and was entrusted to the guardianship of the president (*ἐπιστάτης*) of the senate of the Five Hundred. When a city was added to a confederation, the agreement involved was engraved on a tablet; thus when Sparta became a member of the Achæan league, Polybius states . . . *καὶ μετὰ ταῦτα στήλης προγραφείσης*.² At a council at Clitor, in Arcadia, 184 B.C., Lycortas, the representative of the Achæans, thus addressed the Roman commissioners: "What we have ratified by our oaths, what we have consecrated as inviolable to eternal remembrance, by records engraved in stone, they want to abolish, and load us with perjury. Romans, for you we have high respect; and, if such is your wish, dread also; but we respect and dread more the immortal gods."³

In China also documents of this kind were carefully deposited in a sacred place called *Meng-fu*, the 'palace of treaties.'⁴ Most ancient States had similar provisions.

Hostages.

To ensure the performance of the conditions of treaties, especially so in important or doubtful cases, hostages⁵ were frequently given or exchanged. This was an institution which obtained universally amongst the nations of antiquity. Thus in ancient China, the

¹ *Corp. inscrip. Graec.* no. 6785; cf. nos. 3450, 3858.

² xxiii. 18.

³ Liv. xxxix. 37: "Quae iure iurando, quae monumentis litterarum in lapide insculptis in aeternam memoriam sancta atque sacrata sunt, ea cum periurio nostro tollere parant. Veremur quidem vos, Romani, et, si ita vultis, etiam timemus; sed plus et veremur et timemus deos immortales."

⁴ Martin, *Traces of int. law in Ancient China*, loc. cit. p. 72.

⁵ Cf. Bender, *Antikes Völkerrecht*, pp. 39 seq.

Prince of Tsin demanded the mother of the Prince of Chi as a guarantee of the latter's submission and good faith.¹ The practice continued down to comparatively recent times ; we hear of it in Europe even as late as the year 1748, when two English peers were sent to Paris as pledges for the fulfilment of the treaty of Aix-la-Chapelle.

Hostages were usually exchanged when alliances were established on a basis of equality, or when other kinds of treaties were mutually agreed upon, and not merely dictated by one party or the other. Thus it was agreed between Perseus and Genthius, 168 B.C., that each of them should send the other such hostages as were specified in the text of the treaty.² They were also given to secure the final fulfilment of a union that had previously been agreed upon between two States, as in the case of the Sequani and the Helvetii.³ When hostages were not exchanged, but given only by one of the States to the other, this circumstance indicated the absence of strictly equal relationships between them, and the dependence, in greater or lesser degree, of the one to the other. Thus at the time of Roman supremacy and the victorious expansion of her empire, Rome invariably demanded hostages from other States without sending any in return. In the expedition of Attalus, king of Pergamum, against the cities which had joined Achæus, many of them were compelled to surrender to him ; he received them on the same terms as they had enjoyed before, but this time he demanded hostages.⁴ In 173 B.C. Perseus had requested a conference with Marcius, and was desirous of being attended by his entire retinue ; but the Roman ambassador required either that he should come only with three attendants, or, if with so numerous a band, that he should give hostages as a guarantee that no treachery would be used during the conference. Perseus accord-

When and why
given.

¹ Martin, *loc. cit.*

² Polyb. xxix. 3.—Cf. Liv. xlv. 23.

³ Caes. *Bell. gall.* i. 9 ; cf. iii. 23.

⁴ Polyb. v. 77.

ingly sent two of his close friends, whom he had before despatched as ambassadors. These hostages were demanded, says Livy, not so much to receive a pledge of fidelity, as to make it clear to the allies that the king did not meet the Roman ambassadors on a footing of equality.¹ Ambassadors from Antiochus came in 190 B.C. to Publius Scipio, and at the council that was held various conditions were laid down by the Romans, who further required, as a pledge of the performance thereof, twenty hostages to be chosen by themselves.² Sometimes Rome found herself in a less favourable position, and was compelled to give hostages without receiving any. Thus, in connection with the notable capitulation of the Romans at the Caudine Forks (321 B.C.), the subsequent ratification of the peace entered into between the Roman consuls and Pontius, the leader of the Samnites, was to be guaranteed by the delivery to the latter of six hundred Roman knights; and in default of confirmation by the Roman authorities, the hostages were to suffer death.³

Number
required.

The number of hostages demanded varied considerably from time to time, and naturally depended on the importance of, and the nature of the issues involved in, the undertaking, and on the mutual, or unilateral (as the case may be) distrust or suspicion of the parties thereto. In the treaty with Antiochus, 188 B.C., twenty hostages were required.⁴ After the battle of Zama, the Carthaginians were obliged to give the Romans a hundred.⁵ On the surrender of the Carthaginians to

¹ Liv. xlii. 39: "Nec tam in pignus fidei obsides desiderati erant, quam ut appareret sociis, nequaquam ex dignitate pari congrédi regem cum legatis."

² Liv. xxxvii. 45: "Haec quum pepigerimus, facturos vos ut pro certo habeamus, erit quidem aliquod pignus, si obsides viginti nostro arbitratu dabitis. . . ."—Cf. Polyb. xxi. 17.

³ Liv. ix. 5: "... Propter necessariam foederis dilationem obsides etiam sexcenti equites imperati, qui capite luerent, si pacto non staretur. tempus inde statutum tradendis obsidibus exercituque inermi mittendo."

⁴ Polyb. xxi. 45.

⁵ Polyb. xv. 18.

Rome, 149 B.C., the senate restored to them their liberty and territory on the condition of their sending three hundred hostages, sons of senators or councillors, as a guarantee that they would fulfil certain terms to be subsequently formulated.¹ When Carthagena capitulated to Scipio, the hostages numbered over three hundred.² In later times a still greater number was insisted on, as in the case of six hundred demanded by Caesar.³

All classes of inhabitants—men, women, or children—^{Who chosen as hostages.} could be hostages. Among the Carthaginian hostages given to Scipio some were children. These, says Polybius, the Roman general summoned to him one by one, and, stroking their heads, told them not to be afraid, for in a few days they would see their parents.⁴ Tacitus relates that to the Germans the idea of a woman led into captivity was intolerable; and hence when the daughters of illustrious families were delivered as hostages, the most effective obligation was thereby engendered.⁵ Similarly, in the case of nephews despatched to other countries,—for the relationship between uncles and nephews involved a particularly esteemed tie of consanguinity.⁶ With the beginning of the Empire, Rome frequently received women as hostages. In the case of some communities, says Suetonius, Augustus required a new kind of hostages, namely their women; as he had found from experience that they cared little for their men when thus delivered.⁷

¹ Polyb. xxxvi. 4.

² Polyb. x. 18.

³ Caes. *Bell. gall.* ii. 15; vii. 11.

⁴ Polyb. x. 18: καὶ τοὺς μὲν παῖδας καθ' ἕνα προσαγαγόμενος καὶ καταψήσας θαρραίνει ἐκέλευε, διότι μετ' ὀλίγας ἡμέρας ἐπὶ ὄψονται τοὺς αὐτῶν γονεῖς.

⁵ Tacit. *Germ.* 8: "... Adeo ut efficacius obligentur animi civitatum quibus inter obsides puellae quoque nobiles imperantur."

⁶ Tacit. *Germ.* 20: "Quidam sanctiorem artioreque hunc nexum sanguinis arbitrantur, et in accipiendis obsidibus magis exigunt, tamquam [ii] et animum firmitus et domum latius teneant."

⁷ Sueton. *Aug.* 21: "... novum genus obsidum, feminas, exigere temptaverit, quod negligere marum pignera sentiebat."

In earlier times women were in all probability likewise received by the Romans, as they themselves undoubtedly gave such pledges. When Porsena withdrew his troops from the Janiculum, and peace was concluded, 508 B.C., the Romans gave him hostages, among whom were many maidens. According to Livy's story, the camp of the Etrurians having been pitched near the Tiber, a young Roman lady named Cloelia, one of these hostages, deceiving her guards, swam over the river, amidst the darts of the enemy, at the head of a number of virgins, and brought them back all safe to their relations.¹

The State receiving the hostages usually specified who were to be sent, and sometimes limited their age. Members of the royal family,² or senators and other high functionaries³ thus served as hostages; though, occasionally, certain restrictions were made in this respect. The arrangement with the Aetolians, 189 B.C., illustrates several of these points. The Romans in this case demanded that they should deliver to the consul forty hostages, not less than twelve or more than forty years old, who were to be retained six years, that is, during the period agreed upon for the payment of a certain indemnity; that the same should be freely chosen by the Romans, excepting only the Aetolian strategus, the hipparch, the public secretary, and those who had previously served as hostages in Rome; and, further, that if any died within the aforesaid time, others should be sent in their place.⁴ In the treaty with Antiochus,

¹ Liv. ii. 13: "... Et Cloelia virgo una ex obsidibus, quum castra Etruscorum forte haud procul ripa Tiberis locata essent, frustrata custodes, dux agminis virginum inter tela hostium Tiberim tranavit sospitesque omnes Romam ad propinquos restituit."—Cf. Virg. *Aen.* viii. 651.

² Polyb. xviii. 39.

³ Polyb. xxxvi. 4.

⁴ Polyb. xxi. 32: δότωσαν Αἰτωλοὶ ὁμήρους τῷ στρατηγῷ τετταράκοντα, μὴ νεωτέρους ἐτῶν δώδεκα μηδὲ πρεσβυτέρους τετταράκοντα, εἰς ἔτη ἕξ, οὓς ἂν Ῥωμαῖοι προκρίνωσι, χωρὶς στρατηγοῦ καὶ ἱππάρχου καὶ δημοσίου γραμματέως καὶ τῶν ὠμηρευκότων ἐν Ῥώμῃ. καὶ τὰ ἡμέρη καθιστάτωσαν εἰς Ῥώμην. εἰάν δέ τις ἀποθάνῃ τῶν ὁμήρων, ἄλλον ἀντικαθιστάτωσαν.

188 B.C., the twenty hostages demanded by Rome were to be between the ages of eighteen and forty-five, and were to be changed every three years.¹ By the conditions imposed on Carthage after her defeat at Zama, the hundred hostages were to be such young men, between fourteen and thirty years of age, as were chosen by the Roman general.²

Sometimes their delivery was to be effected immediately on the ratification of a treaty ; in other cases, at a fixed time thereafter. Thus, thirty days was the time allowed to the Carthaginians for the despatch of three hundred hostages to Lilybaeum, on the south coast of Sicily.³ When Opimius was in Gaul, 154 B.C., he took Aegitna, defeated the Oxybii and the Deciatae, delivered their territory to the people of Massilia, and imposed on the Ligurians the future obligation of giving hostages to the Massilians at certain fixed intervals.⁴

When the specified conditions were fulfilled, or good faith clearly vindicated, the hostages were returned unharmed to their country. Thus, an embassy from Philip arrived in Rome, 190 B.C., and set forth to the senate the loyalty and zeal shown to the Romans by their king in the war against Antiochus ; whereupon, apart from other concessions, Philip's son, Demetrius, was at once relieved of his position as hostage. Similarly, at the request of Spartan ambassadors, the Lacedaemonian hostages (except Armenes, son of Nabis) were released.⁵ Again, after the surrender of Carthage to Scipio, 209 B.C., the Roman general exhorted the hostages to be of good cheer ; and he advised them to write to their countrymen that they were safe and well, and that they would all be restored unharmed to their homes, as soon as the Roman alliance was accepted.⁶

¹ Polyb. xxi. 45.

² Polyb. xv. 18 : ὁμήρους δοῦναι πίστει χάριν ἑκατὸν οὓς ἀν προγράψῃ τῶν νέων ὁ στρατηγὸς τῶν Ῥωμαίων, μὴ νεωτέρους τετταρεσκαίδεκα ἐτῶν μὴδὲ πρεσβυτέρους τριάκοντα.

³ Polyb. xxxvi. 4.

⁴ Polyb. xxxiii. 11.

⁵ Polyb. xxi. 2.—Cf. Liv. xxxvi. 35.

⁶ Polyb. x. 18.

When the time for return was not determined beforehand, hostages might remain many years in the power of the foreign State; as, for example, in the case of Demetrius, the son of Seleucus IV. Philopator, who was sent as a child to Rome, as a pledge of the king's good faith, and remained there till he was twenty-three years of age. If a hostage was given as a guarantee of an individual's personal fidelity, it was held that on the death of the latter the restitution of the hostage should at once be effected, as he could not be detained as a similar pledge to ensure the good faith of the successor of the deceased. Representations to this effect were made to the Roman senate by Demetrius who, on the death of his father and the succession of his uncle Antiochus Epiphanes, urged that his detention was after that event unjust.¹ Suetonius states that Augustus always gave ample opportunities to foreign States of getting back their hostages whenever they desired it.²

Hostages in
a truce or
sponsio.

When hostages were received by a commander in reference to the negotiation for a truce or a *sponsio*, they were to be returned unharmed if such engagement was not afterwards ratified by his government. In the conclusion of the four months' armistice between Flamininus and Philip, 197 B.C., it was expressly laid down that if the agreement was not confirmed by Rome, both the money and the hostages delivered by Philip were to be duly restored.³ But if a *sponsio* was entered into between the victor in the field and the vanquished party on terms which were necessarily to the advantage of the former, the repudiation of the engagement by the government of the latter frequently entailed the infliction of death on hostages who had

¹ Polyb. xxxi. 12 : δοθῆναι γὰρ ὑπὸ Σελεύκου τοῦ πατρὸς τῆς ἐκείνου πίστewς ἕνεκεν, Ἀντιόχου δὲ μετεκληφότες τὴν βασιλείαν οὐκ ὀφείλειν ὑπὲρ τῶν ἐκείνου τέκνων ὀμηρεύειν.

² Sueton. Aug. 21 : "... potestatem semper omnibus fecit, quotiens vellent obsides recipiendi."

³ Polyb. xviii. 39.

been given to guarantee the compact. In the Caudine peace—Pontius, the Samnite general, expressly stipulated, in the capacity of a conqueror, that the six hundred Roman knights delivered to him were to forfeit their lives if the engagement were not fulfilled,—“sexcenti equites imperati, qui capite luerent, si pacto non staretur.”¹

If a formal undertaking was violated, hostages that had been given as security were regarded as prisoners of war, and sometimes subjected to measures of an extreme and merciless character.² Similarly, if they were surrendered after they had unjustifiably escaped from those who held them. When war broke out, hostages of the enemy were considered prisoners of war, and afterwards classed with the ordinary captives in triumphal processions,—as in the case of Titus Quinctius' triumph, 194 B.C.³

Treatment of
hostages.

Hostages of a foreign country given to a State which was afterwards engaged in hostilities with a third power were liable to be captured and treated as prisoners of war by the latter. They did not enjoy, in this respect, the absolute immunity of accredited ambassadors. Thus, hostages of Cotys, King of Thrace, had been sent to Perseus with whom Rome was at war; they were taken by the Romans, and afterwards admitted to ransom on the same footing as ordinary enemy captives.⁴

Generally speaking, however, in the absence of these circumstances, hostages were deemed inviolable, and in Rome were treated with marked kindness and consideration. If there was no fear of their escape, they enjoyed great freedom, and even had access to the highest ranks of Roman citizens.⁵ Scipio's conduct

¹ Liv. ix. 5.

² Cf. Caes. *Bell. gall.* i. 31.

³ Liv. xxxiv. 52 : “... et ante currum multi nobiles captivi obsidesque, inter quos Demetrius, regis Philippi filius, fuit et Armenes, Nabidis tyranni filius, Lacedaemonius.”

⁴ Liv. xlv. 42.

⁵ Cf. Liv. xlii. 6 (on the occasion of an embassy to Rome, 173 B.C., despatched by Antiochus, to renew the treaty of alliance that had

towards his hostages offered a striking contrast to their brutal treatment by the Carthaginians,¹ and other nations ; thus Ambiorix complained to Caesar that the Aduatuci kept his own son and his nephew, who had been sent as hostages, in slavery and in chains.²

Escape of
hostages.

If hostages escaped with the connivance of their own government, such violation of faith was held to be a just ground for war, or for retaliation in any other way that was possible. But if the State was not a party to the act, the fugitives were alone guilty, and were liable to extradition, and extreme punishment. After Cloelia and the other Roman maidens had made good their escape, Tarquinius accused the Romans of perfidy,—whereupon the Roman consul cleared his countrymen of the charge of treachery by proving that the hostages had fled on their own initiative, and not at the instance of their parents.³ Livy adds, in his version of the story, that Lars Porsena, the King of Clusium, demanded her surrender, and promised to return her and half the number of the hostages as a reward for her valour ; and that when she was sent back, he faithfully carried out his promise.⁴

Promise
without
religious
formula.

A mere promise without being supplemented and confirmed by a fitting religious formula was not con-

been made with his father) : “Ea merita in se senatus fuisse, cum Romae esset, eam comitatem iuventutis, ut pro rege, non pro obside omnibus ordinibus fuerit.” (Such had been the kindness of the senate towards him when he was at Rome, such the courtesy of the young men, that he was treated, among all ranks of inhabitants, not as a hostage, but as a sovereign.)

¹ Polyb. x. 18.

² Caes. *Bell. gall.* v. 27.

³ Dion. Hal. v. 33 : “Ἐνθα δὴ πολλὸς ὁ Ταρκύνιος ἦν ἐπιορκίαν τε καὶ ἀπιστίαν τοῖς Ῥωμαίοις ἐγκαλῶν. . . Ἀπολογουμένου δὲ τοῦ ὑπάτου καὶ τὸ ἔργον ἐξ αὐτῶν λέγοντος γεγονέναι τῶν παρθένων, δέχα τῆς ἐπιταγῆς τῶν πατέρων, καὶ τὸ πιστὸν οὐκ εἰς μακρὰν παρέξασθαι λέγοντος ὑπὲρ τοῦ μηδὲν ἐξ ἐπιβουλῆς ὑφ’ ἐαυτῶν πεπράχθαι. . .

⁴ Liv. ii. 13.—(We are not here concerned with the incongruities of the Roman annalists in reference to this story ; its substance alone suffices to indicate the general practice of more ancient times.)

sidered to be necessarily binding. Thus, after the defeat of the Thebans by the Plataeans, 431 B.C., the former complained of the slaughter of prisoners; but the Plataeans did not admit they ever promised to restore the captives at once, but only if they could come to an agreement after due negotiations; and, moreover, they denied that they took an oath.¹

The literal fulfilment of an engagement or oath was sometimes made to override the spirit and implied objects of an agreement. For example, Paches, after his pursuit of Alcidas (427 B.C.), landed at Notium, the port of Colophon, at the invitation of an anti-Persian faction which had been driven out. Paches then proposed to Hippias, the commander of the Arcadians, that they should hold a conference, undertaking himself, if they could not come to terms, to put him back in the fort safe and sound. In the meantime Paches took the fort, and slaughtered the Arcadians and barbarians he found there. "He then conducted Hippias into the fort according to the agreement," says Thucydides, "and when he was inside, seized him and shot him dead with arrows."² Again, a provision in a treaty for the restoration of cities captured during the war was not regarded as including those cities which had voluntarily capitulated. Thus, at the Peace of Nicias, 421 B.C., concluded on the basis of a mutual restitution of prisoners and places taken during the war, Thebes retained Plataea on the ground that it had been voluntarily surrendered, and Athens, on a similar plea, was allowed to hold Nisaea, Anactorium, and Sollium. In the treaty between Rome and the Aetolians, 197 B.C., concluded with the object of breaking the power of Macedonia, it was provided that all the movable property taken as booty

The letter sometimes prevailed over the real intention.

Action of Paches.

Peace of Nicias.

Treaty between Rome and the Aetolians.

¹Thuc. ii. 5: Πλαταιῆς δ' οὐχ ὁμολογοῦσι τοὺς ἄνδρας εὐθὺς ὑποσχέσθαι ἀποδώσειν, ἀλλὰ λόγων πρῶτον γενομένων ἢ τι ξυμβαίνωσιν, καὶ ἐπομόσαι οὐ φασιν.

²Thuc. iii. 34: καὶ τὸν Ἰππίαν ὕστερον ἐσαγαγὼν ὥσπερ ἐσπεύσατο, ἐπειδὴ ἔνδον ἦν, ξυλλαμβάνει καὶ κατατοξεύει.

should go to the Romans, the lands and conquered towns to the Aetolians,—“ut belli præda rerum, quæ ferri agique possent, Romanos, ager urbesque captæ Aetolos sequerentur.”¹ After the defeat of Philip, the Aetolians, through their representative Phaeneas, claimed the Thessalian cities in accordance with the terms of this engagement. To rebut the claim Quinctius argued that, in the first place, the Aetolians, on deserting the Romans, and making peace with Philip, had themselves annulled the conditions of the treaty; and, in the second place, even supposing that the argument still retained some validity, the clause, on which the claim was based, spoke only of captured cities—whereas the states of Thessaly had surrendered of their own free will.² Commenting on this reply of Quinctius, Laurent observes: “Un disciple de Machiavel n’aurait pas mieux dit,”³—as though forensic arguments of a subtle and evasive character were unknown in more modern and more enlightened times.

When a treaty
could be
broken.

Where two
treaties are
antagonistic
to each other.

Both in Greece and in Rome it was held that there were certain circumstances under which it was permissible to break a treaty. If, for example, there were two treaties relating to the same or similar objects, and if such treaties eventually proved to be really antagonistic to each other or substantially inconsistent as to their manifest intentions, then the more private one and less general in nature could be legitimately discarded in favour of the solemn and more general convention: καὶ πότερα δευότερον ἀν ποιήσετε; τὰ κατ’ ἰδίαν πρὸς Αἰτωλοὺς ὑμῖν συγκείμενα δίκαια παριδόντες; ἦ

¹ Liv. xxxiii. 13.

² Liv. xxxiii. 13: “Vos, inquit, ipsi, Quinctius, societatis istius leges rupistis, quo tempore relictis nobis cum Philippo pacem fecistis. Quæ si maneret, captarum tamen urbium illa lex foret. Thessaliae civitates sua voluntate in dicionem nostram venerunt.”

³ *Hist. du dr. des gens*, vol. iii. p. 195.

τὰ πάντων τῶν Ἑλλήνων ἐναντίον ἐν στήλῃ γεγονότα καὶ καθιερωμένα ;¹

Again, if a treaty entered into should afterwards be discovered to exact or involve a hostile attitude to friendly or confederate States, it could be cancelled. "Do you consider it a duty," argued Lyciscus, the Acarnanian envoy at Sparta, "to keep faith with friends? Yet it is not so much a point of conscience to confirm written pledges of a faith, as it is a violation of conscience to make war on those who preserved you,"—καὶ ἡ οὐχ οὕτως ὁσιόν ἐστι τὸ τὰς ἐγγράπτους πίστεις βεβαιοῦν, ὥς ἀνόσιον τὸ τοῖς σώσασι πολεμεῖν,²—and this, he says, is what the Aetolians have actually come to demand.

Thirdly, if the surrounding circumstances under which a treaty was concluded should afterwards undergo an entire change, then, if strict adherence to the engagement would be obviously detrimental to the policy of the State, the treaty might, by virtue of supreme necessity, be annulled. "If the circumstances are the same now," the argument of Lyciscus continues, "as at the time when you made alliance with the Aetolians, then your policy ought to remain on the same lines. That was their first proposition. But if they have been entirely changed, then it is fair that you should now deliberate on the demands made to you as on a matter entirely new and unprejudiced." εἰ μὲν ὁμοία εἴη τὰ πράγματα νῦν καὶ καθ' οὗς καιροὺς ἐποιεῖσθε τὴν πρὸς τούτους συμμαχίαν, διότι δεῖ μένειν καὶ τὴν ὑμετέραν αἵρεσιν ἐπὶ τῶν ὑποκειμένων. ταῦτα γὰρ ἐν ἀρχαῖς εἶναι. εἰ δ' ὁλοσχερῶς ἡλλοίωται, διότι δίκαιόν ἐστι καὶ νῦν ὑμᾶς ἐξ ἀκεραίου βουλευέσθαι περὶ τῶν παρακελευομένων.³

On some occasions, in order to avoid deliberate infraction of a treaty by one of the contracting parties,

¹ Polyb. ix. 36. (Which will be the graver breach of obligation, argues Lyciscus, to neglect a private arrangement entered into with the Aetolians, or a treaty that has been inscribed on a column and solemnly consecrated in the eyes of the whole of Greece ?)

• Polyb. ix. 36.

³ Polyb. ix. 37.—Cf. *ibid.* ix. 32.

Treaty
implying
hostile
attitude to
friendly State.

If complete
change of
circumstances.

Treaties for
amending
previous
conventions.

Treaty between
Athens and
Sparta.

a subsequent treaty was specially entered into to supplement or modify the terms of the previous one. Indeed, we find express clauses sometimes inserted in a treaty providing for its later amendment should the parties thereto mutually consent. This, of course, in itself implies a distinct recognition on the part of States that a party to an agreement cannot liberate itself from its obligations, or modify its stipulations without obtaining in a formal manner the express consent of the other signatories. Thus, in the treaty of peace between Athens and Lacedaemon (421 B.C.), there is a clause to the effect that if anything whatever be forgotten on one side or the other, either party may, without necessarily violating their oaths, take honest counsel and alter the provisions in such a way as may seem acceptable to both parties,—*εἰ δέ τι ἀμνημονούσιν ὅποτεροιούν καὶ ὅτου πέρι, λόγοις δίκαιοις χρωμένοις εὖορκον εἶναι ἀμφοτέροις ταύτη μεταθεῖναι ὅπῃ ἂν δοκῇ ἀμφοτέροις.*¹

Alliance
between
Athens and
Sparta.

In the alliance between the same States (421 B.C.) it is stipulated in the fifth clause that if the parties agree that anything shall be added to or taken away from the treaty of alliance, whatever it may be, this may be done without violation of their oaths. **Ὡν δέ τι δοκῇ Λακεδαιμονίοις καὶ Ἀθηναίοις προσθεῖναι καὶ ἀφελεῖν περὶ τῆς ξυμμαχίας, ὅ τι ἂν δοκῇ, εὖορκον ἀμφοτέροις εἶναι.*²

Alliance
between
Athens, Argos,
Elis, and
Mantinea.

Again, in the alliance between Athens, Argos, Elis, and Mantinea (420 B.C.), it is provided that these cities may make any amendment in the treaty that they may think desirable, provided there is common agreement thereon. *Ἐὰν δέ τι δοκῇ ἀμεινον εἶναι ταῖς πόλεσι ταύταις προσθεῖναι πρὸς τοῖς ξυγκειμένοις ὅ τι δ' ἂν δόξῃ ταῖς πόλεσιν ἀπάσαις κοινῇ βουλευσαμέναις, τοῦτο κύριον εἶναι.*³

Compromise
clauses in
treaties.

Not infrequently do we find in treaties certain clauses which are somewhat of the nature of our modern compromise clauses ('clauses compromissaires'), e.g. for the seemingly compulsory determination of disputes by pacific means. Thus the fourth article of the treaty

¹ Thuc. v. 18.

² Thuc. v. 23.

³ Thuc. v. 47.

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between the Lacedaemonians and their allies on the one part, and the Athenians and their allies on the other, 421 B.C., after stipulating that the signatories shall not be allowed to bear arms to the injury of one another in any way, lays down that any controversy that may arise between them shall be settled by oaths, and by such other legal means as they may agree on.¹

The attitude of Rome to international treaties varied according as they were concluded in the first period of her history or in the second. In the case of the first a greater measure of reciprocity obtained, as well as a more effective recognition of the juridical personality and equality of States. In her second epoch, with the rapid extension of empire and absorption of foreign countries, the basis of equality gave way very often to the relationship of sovereign and dependent, strict reciprocity of treaty stipulations being replaced by a dictatorial insistence of stated conditions; so that in the end, as Mommsen observes, the formal expression of the bilateral character of treaties came to be eliminated.²

Attitude of
Rome to
international
treaties.

But apart from this process of deliberate subjection of peoples—and there were numerous relationships other than this—the preceding remark does not apply in its full extent. The Roman treaty possessed the form of a juridical act, and produced bilateral obligations of a legal nature. No doubt divers treaties were from time to time violated by the Romans in their unprecedented position of lords and conquerors of the world, but many were duly observed by them, even if they operated to their own disadvantage. Thus the provisions in the alliance with the Sabines respecting the alternate election of the king were fulfilled on both sides. The treaty between Spurius Cassius and the Latin towns was duly executed at the time of the taking

Roman treaty
as a juridical
act.

Fidelity to
engagements.

¹ Thuc. v. 18: "Ὦν δέ τι διάφορον ἢ πρὸς ἀλλήλους, δικαίῳ χρήσθων καὶ ὅρκοις, καθ' ὃ τι ἂν ξυμβῶνται.

² *Röm. Staatsr.* vol. iii. pt. i. p. 666.

Cases of non-observance.

Juridical subtlety.

Reasons usually advanced for breach.

of Antium, when an impartial division of the conquest was made between the Romans, the Latins, and the Hernicans (493 B.C.).¹ The forty years' truce between Rome and Veii (473 B.C.) was not violated. And many other examples can be quoted of the Romans' fidelity to engagements,—though they would for the most part be drawn confessedly from the earlier history. On the other hand, there are cases, it must be admitted, of their non-observance of treaties. (But are such breaches confined exclusively to antiquity?) The subtle spirit of formalism in the Roman intellect, the forensic cunning born of habits of litigation, the attachment to and insistence on extreme refinements of expression in legal formulae, with the consequent development of ingenious methods of evasion,—all these factors (not to mention a variety of other circumstances) co-operated effectively to secure in international conventions such provisions as were designedly made ambiguous or such as gave rise, through any other defective or obscure statement, to conflicting interpretations, or to seemingly inconsistent intentions on the part of the signatories. In such cases, therefore, the Romans found a ready means of escape; though, by way of admitting their subjection to the sovereignty of law and the sanction of contractual obligations, they invariably advanced, in support of their action, ostensibly juridical reasons. And so we constantly get the patriotic historians' eulogy of the unexampled fidelity of their government;² but this eulogy usually results from a comparison with the conduct of other nations;—and in the case of such comparison the Romans, in truth, do not suffer. The observations of a modern Italian writer already referred to, M. Baviera, are almost of the same tenour. He points out how the violation of engagements by the Romans was always based on juridical reasons, on some

¹ Cf. Dion. Hal. vi. 95.

² Cf. A. Rivier, *Introduction au droit des gens* (Hamburg, 1891), p. 251: "Les récits des historiens qui portent aux nues la fidélité des Romains sont sujets à caution."

pretext, perhaps, or cavil—if one prefers to say so—but always founded on conflicting interpretations of an ambiguous clause, on the absence of a certain essential formality, on the involved infringement of a legal principle. "...E la rottura è rappresentata sempre da un motivo giuridico, un pretesto, un cavillo se vogliamo, ma poggiato sul conflitto di interpretazione di una clausola ambigua, sulla mancanza di una formalità, sulla violazione di un principio di diritto."¹ The same writer refers to the Caudine convention annulled by the Romans,—an act of bad faith, be it admitted; but the Roman juridical theory, he maintains, justified it on the ground that the conclusion of a treaty without the approval of the people could not be binding. It has already been shown, moreover, that in the case of such unratified *sponsiones*, the recognized legal principle of *deditio* was put into operation, so that those who bound themselves as sponsors should alone atone for their acts. And this principle, it is to be remembered, was not invoked exclusively by the Romans as a means of evading their responsibility; for such was the accepted practice of States in general at that time.

To bring to a close the consideration of the form and significance of the later treaties of Greece and Rome, it will be well to state briefly the usual order of proceedings adopted in their conclusion.

Order of proceedings in the conclusion of the later treaties.

In the case of Greece, as, for example, in the establishment of alliances, there was, first of all, the intervention of the herald to get permission to hold negotiations, or to announce their commencement. Then there were the preliminary proposals, the overtures,—*σύμβασις* or *συμβατήριος λόγος*²—conveyed by the ambassadors. In case of war a truce or armistice was agreed upon. Deliberations in the public assemblies, sometimes (as has already been pointed out) in

Function of herald.

Overtures by envoys.

Deliberations.

¹ *Archivio Giuridico* (1898), p. 485.

² *Thuc.* v. 76; cf. Egger, *Traité public*, p. 11.

Exchange of letters.	private committees, followed. Frequently, letters were exchanged between the parties (<i>ἐπιστολαί, γράμματα, epistolae, litterae</i>), especially official declarations, — decrees (<i>ψηφίσματα</i>) of the assemblies of the people, <i>e.g.</i> in Athens, of the <i>ἐκκλησία</i> , or elsewhere of princes (<i>διαγράμματα</i>). ¹ After the final drafting of the various clauses and examination thereof by the assembly, there was passed a decree of acceptance or rejection, as the case might be; if the former, there followed official promulgation, and exchange of ratifications, <i>ὁμολογίαι</i> . Solemn oaths were taken to ensure the due fulfilment of all the stipulations; and the gods were invoked to witness the engagement (as in the case of the earlier treaties,—though in less elaborate form). Official copies were then exchanged, containing the public seals of the States concerned, and sometimes also the private seals of the plenipotentiaries. Decrees were, as a rule, passed assuring the execution of the treaty by means of certain political or military measures. Finally, the acts were inscribed on bronze or marble tablets (<i>στήλαι</i>) and deposited in temples or public buildings set apart for the purpose. And a copy of this was occasionally sent to third States, by way of an additional guarantee of the observance of the compact.
Drafting.	
Examination by assembly.	
Decree of acceptance or rejection.	
Exchange of ratifications.	
Solemn oaths.	
Invocation.	
Exchange of official copies.	
Decrees assuring execution.	
Records deposited.	
Festival to commemorate alliance or peace.	To commemorate the alliance or peace an annual festival was not uncommonly held, as Isocrates states in connection with a peace between Athens and Sparta. ² Such general assemblies undoubtedly had an excellent effect in regard to the maintenance of peace, as is well pointed out by the same orator: "Now those who established the great festivals are justly praised for handing down to us a custom which induces us to

¹ The difference between the *γράμμα* and the *διάγραμμα* is by no means always observed. On the use of the word *γράμμα*, cf. Diod. xviii. 58. (*Ἦκε δὲ καὶ παρ' Ὀλυμπιάδος αὐτῷ γράμματα, δεομένης καὶ λιπαρούσης βοηθεῖν τοῖς βασιλεύσι καὶ ἑαυτῇ.*)

² *Antidosis*, 110: ... ὥσθ' ἡμᾶς μὲν ἀπ' ἐκείνης τῆς ἡμέρας θύειν αὐτῇ καθ' ἕκαστον τὸν ἑνιαυτὸν ὥς οὐδεμιᾶς ἄλλης οὕτω τῇ πόλει συνενεγκούσης. ...

enter into treaties with one another, to reconcile the hostile feelings that may exist amongst us, and to assemble in one place; and besides, by taking part in the common prayers and sacrifices, we are reminded of the original tie of kinship between us, and become more kindly disposed towards each other for our future relationships, and so we renew old friendships and establish new ones."¹

We hear also of decrees passed in honour of those who had faithfully fulfilled their obligations.

In reference to the record of treaties, we very often find legends on coins as an additional form of official attestation of alliances and other treaties concluded between States. There are numerous extant medals of Asiatic cities bearing inscriptions to this effect: 'Alliance (ὁμόνοια) of the inhabitants of... and those of...', together with a representation of the guardian deities of the respective communities, sometimes even extending hands to each other; as, for example, in the alliance between the Milesians and the Smyrnaeans; between Hierapolis and Ephesus; between Coliaeum and Ephesus; etc.²

Additional records of treaties.

Now as to the treaties of Rome concluded in the time of the Republic.³ First there was a vote by the senate which was followed by a ratification by the people. Sometimes the first step in the proceedings was taken

Later Roman treaties.
Vote by senate.
Ratification by people.

¹ Isoc. *Panegy.* 43: Τῶν τοίνυν τὰς πανηγύρεις καταστησάντων δικαίως ἐπαινουμένῳ, ὅτι τοιοῦτον ἔθος ἡμῖν παρέδωκεν ὥστε σπειραμένους καὶ τὰς ἔχθρας τὰς ἐνεστηκυίας διαλυσαμένους συνελθεῖν εἰς ταῦτόν, καὶ μετὰ ταῦτ' εὐχὰς καὶ θυσίας κοινὰς ποιησαμένους ἀναμνησθῆναι μὲν τῆς συγγενείας τῆς πρὸς ἀλλήλους ὑπαρχούσης, εὐμενεστέρας δ' εἰς τὸν λοιπὸν χρόνον διατεθῆναι πρὸς ἡμᾶς αὐτοὺς, καὶ τὰς τε παλαιὰς ξενίας ἀνανεώσασθαι καὶ καινὰς ἐτέρας ποιῆσασθαι. . . . Cf. Plut. *Lycurg.* 1.

² Cf. A. Maury, *Histoire des religions de la Grèce antique*, 3 tom. (Paris, 1856-9), vol. ii. p. 11, note 1.

³ Cf. A. Weiss, *Le droit fétial et les fétiaux* (in *France judiciaire*, Paris, 1882-3), on the relationship of the fétial magistrates to the conclusion of treaties.

by the general. Thus, in the case of the treaty concluded with Antipater, chief of the embassy of Antiochus, 191 B.C., Livy relates that the ambassadors besought the conscript fathers to ratify by their authority the peace granted by their general, Lucius Scipio, with the conditions on which he had given it; whereupon the senate voted that the peace should be observed; and the people, a few days later, ordered it. "Legati Antiochi, vulgato petentium veniam more, errorem fassi regis, obtestati sunt Patres conscriptos, ut pacem datam a L. Scipione imperatore, quibus legibus dedisset, confirmarent auctoritate sua. et senatus eam pacem servandam censuit, et paucos post dies populus iussit."¹

Usually the ratification was made by the people, and the treaty voted, by a plebiscite, in the 'comitia tributa.'²

After the ratification by the people, the senate appointed ten commissioners, especially so in more difficult cases, to assist the general in the negotiations, and to draw up the terms of peace. Thus, after the defeat of Philip in Thessaly by Titus Quinctius, 197 B.C., Macedonian ambassadors arrived in Rome to treat for peace. They were conducted out of the city to the 'villa publica,' accommodation was provided for them, and an audience of the senate was given them in the temple of Bellona. On the ambassadors stating that their king would accept any conditions the senate would prescribe, it was decreed, in accordance with long-established practice, that ten ambassadors should be appointed, and that in council with them the general, Titus Quinctius, should grant terms of peace to Philip,—"decem legati more maiorum, quorum ex consilio T. Quinctius imperator leges pacis Philippo daret, decreti."³ The generals, assisted by commissioners, were, as a rule, charged to make arrangements for the cession of territory or for the delimitation of boundaries.

Commissioners
appointed
for the
negotiations.

¹ Liv. xxxvii. 55.

² Liv. xxix. 12; xxx. 43; xxxiii. 25.

³ Liv. xxxiii. 24. Cf. xxxvii. 55.

As in the case of other nations, the conclusion of treaties was celebrated by religious ceremonies, the other contracting party or parties being represented in Rome by ambassadors.¹ If no foreign envoys were present, a number of fetials (at least two) were despatched by the senate to the country concerned in the transaction to officiate in its name. One of these fetials acted as the 'pater patratus,' the other carried a rod, as the symbol of peace and inviolability. They also took with them the sacred herb, the sacred vessels, and the sceptre of Jupiter Feretrius² (this name being probably derived from *ferire*, in reference to his guardianship of treaties and oaths). Having arrived at the foreign territory, the pater patratus recited the dispositions of the treaty, and then pronounced a formula—'fetialium praeformatio'³—given by Livy.⁴ The pater patratus, states the Roman historian, is appointed 'ad iusiurandum patrandum,' that is, to ratify the treaty; and he goes through it in a great many words which, being expressed in a long set form, it is not necessary to repeat. After setting forth the conditions, he says: 'Hear, O Jupiter; hear, O pater patratus of the Alban people, and ye, Alban people, hear. As those condi-

Religious
ceremonial.

¹ Liv. xxxvii. 55.

² Liv. i. 24; xxx. 43: "Fetiales cum in Africam ad foedus ferendum ire iuberentur, ipsis postulantibus senatus consultum factum est in haec verba, ut privos lapides silices privasque verbenas secum ferrent; uti praetor Romanus imperaret, ut foedus ferirent, illi praetorem sagmina poscerent. herbae id genus ex arce sumptum fetialibus dari solet." (203 B.C.).

³ Sueton. *Claud.* 25.

⁴ Liv. i. 24: "Pater patratus ad ius iurandum patrandum, id est sciendum fit foedus, multisque id verbis, quae longo effata carmine non operae est referre, peragit. legibus deinde recitatis, 'audi,' inquit, 'Iuppiter, audi, pater patratus populi Albani, audi tu, populus Albanus; ut illa palam prima postrema ex illis tabulis cerave recitata sunt sine dolo malo, utique ea hic hodie rectissime intellecta sunt, illis legibus populus Romanus prior non deficiet. si prior defexit publico consilio dolo malo, tum tu, ille Diespiter, populum Romanum sic ferito, ut ego hunc porcum hic hodie feriam, tantoque magis ferito, quanto magis potes pollesque.'"

tions, from first to last, have been publicly recited from those tablets without deliberate fraud, and as they have been quite correctly understood here to-day, from those conditions the Roman people will not be the first to swerve. If they are the first to violate any of them deliberately by public concert, then on that day, O Jupiter, do thou strike down the Roman people, as I shall here this day strike down this pig ; and do thou strike them all the more as thou art more powerful.' Saying these words the pater patratus struck down the victim, which was usually a pig (as before mentioned), with his consecrated stone.

Sacrifice.

Fetials in concluding treaties under the Empire.

Though under the Empire the college of fetials had fallen into decay, their traditional functions were by no means forgotten. The prominent part they had played in the conclusion of treaties was assumed very often by the emperors in person. Thus it is related of Claudius that he concluded treaties with foreign princes in the forum, by sacrificing a sow and using the formula which in former times had been employed by the fetials,—“cum regibus foedus in foro icit porca caesa ac vetere fetialium praefatione adhibita.”¹

Oath as to fulfilment of conditions.

After the sacrifice, the generals and magistrates took an oath, on the sceptre of Jupiter, that they would strictly fulfil the conditions agreed to,—“sua carmina Albanis suumque iusiurandum per suum dictatorem suosque sacerdotes peregerunt.”²

Signatures.

Then the fetials who presided over this ceremonial signed the document embodying the treaty,³ and conveyed it to Rome. After this ensued the deliberations of the senate and of the people, who, in any case, reserved to themselves the right of definitive ratification or rejection. In case of approval, the whole college of fetials took a solemn vow to see to the faithful performance of the settled provisions, and to do everything possible to prevent any infringements thereof.⁴

¹ Sueton. *Claud.* 25. ² Liv. i. 24.—Cf. Cic. *Ad Fam.* vii. 12.

³ Liv. ix. 5.

⁴ Dion. Hal. ii. 72 : καὶ τὰ περὶ τὰς συνθήκας δῶτα φυλάττειν.

Finally, the dispositions of the treaty were engraved on a bronze or marble tablet, which was deposited in the Capitol (or in certain temples) in the 'aedes fidei populi Romani.'¹ Records deposited.

¹ Cf. Polyb. iii. 26 : τούτων δὴ τοιούτων ὑπαρχόντων, καὶ τηρουμένων τῶν συνθηκῶν ἔτι νῦν ἐν χαλκώμασι παρὰ τὸν Δία τὸν καπιτώλιον, ἐν τῷ τῶν ἀγορανόμων ταμείῳ. Dion. Hal. iii. 33 : καὶ τῶν ὁμολογιῶν στήλας ἀντιγράφους θέντες ἐν τοῖς ἱεροῖς (in the treaty with the Sabines, the tablets were deposited in temples); cf. Dion. Hal. iv. 26.

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